TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 867. 306 47

THE STATE OF MISSOURI EX RELATIONE THE LACLEDE GAS LIGHT COMPANY, PLAINTIFF IN ERROR,

vs.

MICHAEL J. MURPHY, STREET COMMISSIONER OF THE CITY OF ST. LOUIS, AND THE CITY OF ST. LOUIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED JULY 24, 1895.

(15,957.)

(15,957.)

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1 *Transcript of the Record and Proceedings in the Supreme Court of the State of Missouri.*

In the Supreme — of Missouri, April Term, 1895. In Banc.

STATE OF MISSOURI *ex Rel.* THE LACLEDE GAS LIGHT COMPANY, Relator,
vs.
MICHAEL J. MURPHY, Street Commissioner of the City of St. Louis, and THE CITY OF ST. LOUIS, Respondents.

2 THE UNITED STATES OF AMERICA:

To Michael J. Murphy, street commissioner of the city of St. Louis, and The City of St. Louis, respondents, defendants in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., not exceeding thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein The State of Missouri *ex relatione* The Laclede Gas Light Company, relator, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Theodore Brace, chief justice of the supreme court of the State of Missouri, this second day of July, in the year of our Lord one thousand eight hundred and ninety-five.

THEO. BRACE,
Chief Justice.

[Endorsed:] State of Missouri *ex rel.* Laclede Gas Light Co. *vs.* Michael J. Murphy, street com'r, &c., *et al.* Citation. Filed July 2, 1895. Jno. R. Green, clerk.

UNITED STATES OF AMERICA, *Western District of Missouri*, } *ss:*

I hereby acknowledge due service of the within citation this 2d day of July, A. D. 1895.

W. C. MARSHALL,
Attorney for Defendants in Error,
M. J. Murphy and The City of St. Louis.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before

you, at the April term, 1895, thereof, between The State of Missouri, *ex relatione* The Laclede Gas Light Company, relator, plaintiff in error, and Michael J. Murphy, street commissioner of the city of St. Louis, and The City of St. Louis, respondents, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., not exceeding thirty days from the date of the citation in said cause, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said court *court* may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 2nd day of July, in the year of our Lord one thousand eight hundred and ninety-five.

Seal of the United States Circuit Court for the Western District of Missouri, Central Division.

Issued at office, in the city of Jefferson, with the seal of the circuit court of the United States for the western district of Missouri, central division, dated as aforesaid.

H. C. GEISBERG,
Clerk Circuit Court United States,
Western District of Missouri, Central Division.

Allowed by—
THEO. BRACE,
Chief Justice.

[Endorsed:] No. —. United States circuit court, western district of Missouri, central division. State of Missouri *ex rel.* Laclede Gas Light Co. *vs.* Michael J. Murphy, street com'r, *et al.* Writ of error to the supreme court of the State of Missouri. Returned and filed 2nd day of July, 1895. Jno. R. Green, clerk.

Return to Writ.

UNITED STATES OF AMERICA, } ss:
Western District of Missouri, }

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said supreme court, at the city of Jefferson, this 12th day July, A. D. 1895.

Seal of the Supreme Court of Missouri.

JNO. R. GREEN, *Clerk.*

4 In the Supreme Court of the United States, October Term, 1895.

STATE OF MISSOURI *ex Rel.* LACLEDE GAS LIGHT COMPANY, Relator, Plaintiff in Error,
vs.
M. J. MURPHY, Street Commissioner of the City of St. Louis, and THE CITY OF ST. LOUIS, Respondents, Defendants in Error.

On the second Monday of October in this same term, before the justices of the Supreme Court of the United States, in the city of Washington, comes the relator, the said Laclede Gas Light Company, by its attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said respondents and against the said relator, whereas by the law of the land the said judgment ought to have been given for the said relator and against the said M. J. Murphy and the City of St. Louis, and the writ of mandamus should have been awarded to relator as prayed for, and relator by its attorneys says—

That the supreme court of the State of Missouri erred in overruling relator's demurrer to respondents' return.

And the said court erred in overruling relator's motion to strike out portions of respondents' return.

And the said court erred in sustaining respondents' demurrer to relator's traverse and reply to respondents' return.

5 And said court erred in entering final judgment for respondents on the pleadings in this cause.

And said court erred in denying to relator the writ of mandamus prayed for in its petition in this behalf.

And the court erred in deciding that the ordinance of the city of St. Louis pleaded by respondents, and which is fully set out in relator's reply, is a valid ordinance and binding upon relator, and in deciding that said ordinance does not impair the obligation of a contract between relator and the State of Missouri, and does not impair the vested rights of relator under its charter and the franchises granted to it by the State of Missouri prior to the enactment of said city ordinance.

And said court erred in deciding that said ordinance of the city of St. Louis was a lawful exercise of the police power and binding as such on relator, and that relator was subject to all the provisions and requirements of said city ordinance in the conduct of its business, and that it was bound to accept the same with all its provisions and conform to all its requirements before using the streets of said city for laying its wires beneath the surface of the streets for the purpose of conducting electricity through the city of St. Louis for illuminating purposes.

And said court erred in holding that the art of producing light by electricity was wholly unknown to science at the time the charter and franchise were granted to relator.

6 And the said Laclede Gas Light Company, relator, prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which it hath lost by occasion of the said judgment, &c.

THE LACLEDE GAS LIGHT COMPANY,
By HENRY HITCHCOCK,
G. A. FINKELNBURG,
I. H. LIONBERGER,
Its Attorneys of Record.

6½ [Endorsed:] Filed July 6, 1895. Jno. R. Green, cl'k.

7 STATE OF MISSOURI, *set:*

Be it remembered that heretofore, to wit, on the 26th day of November, 1894, the following proceedings were had in the supreme court of the State of Missouri in a certain cause wherein The State of Missouri at the relation of The Laclede Gas Light Company was relator and Michael J. Murphy, street commissioner of the city of St. Louis, was respondent; which said proceedings were in words and figures as follows, viz:

STATE *ex Rel.* LACLEDE GAS L. CO., Rel.,
v.
M. J. MURPHY, Resp.

Comes now the said relator, by attorney, and files his petition for an alternative writ of mandamus herein; comes also the said parties, by attorneys, and file their suggestions in support and in opposition to said petition: and the said relator is granted three days in which to file further suggestions.

Which said petition is in words and figures as follows, to wit:

Petition for Mandamus.

In the Supreme Court of the State of Missouri, October Term, 1894.

In the Matter of the LACLEDE GAS LIGHT COMPANY.

To the honorable the judges of the supreme court of the State of Missouri:

The Laclede Gas Light Company, relator herein, gives the court to understand and be informed that it, the said relator,
8 is a body politic duly incorporated by an act of the General Assembly of the State of Missouri, approved March 2d, 1857, entitled "An act to incorporate the Laclede Gas Light Company;" that subsequently said act of March 2d, 1857, was amended by certain supplemental and amendatory acts, viz., "An act supplementary and amendatory of an act entitled 'An act to incorporate the Laclede Gas Light Company,'" approved March 3d, 1857, and "An act to amend an act to incorporate the Laclede Gas Light Company," ap-

proved March 26th, 1868; which said three acts of the General Assembly of the State of Missouri are in words and figures as follows:

An act to incorporate the Laclede Gas Light Company.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SEC. 1. James M. Hughes, Edward Bredell, Robert Holmes, John C. Rust, Charles Gibson, Samuel H. Gardner, Henry A. Clover, and Archibald Gamble be, and they are hereby created and constituted a body politic and corporate, by the style of "The Laclede Gas Light Company," and by that name they and their successors and assigns shall have perpetual succession, may contract and be contracted with, sue and be sued, and may also hold and convey, or otherwise manage and dispose of such property, real, personal and mixed, as may be necessary for the purposes of the said corporation and the prosecution of its legitimate business.

SEC. 2. The capital stock of said company shall be fifty thousand dollars, and the same may be increased to two million dollars, which shall be divided into shares of one hundred dollars each.

SEC. 3. The affairs of said company shall be conducted by a board of not less than five directors, and such officers and agents as they may deem necessary; said directors to be chosen annually by the stockholders, each share of stock being entitled to one vote in such election, and they shall hold their offices for one year, and until their successors are elected and qualified; said directors shall have power to ordain and make all needful by-laws, rules and regulations, for the transaction of the business of said company, and, under the direction of the stockholders, may have absolute power over all the property and effects of said company. They may also fill vacancies in their board until the next regular election.

SEC. 4. The said corporators, or a majority of them, may at any time, open books in the city of St. Louis, for subscription to the capital stock of said company, and, upon the sum of fifty thousand dollars being subscribed, may organize said company under this charter.

SEC. 5. The said company, its successors and assigns, shall within all that portion of the present corporate limits of the city of St. Louis, in St. Louis county, not embraced within the corporate limits of said city, as established by the act entitled "An act to incorporate the city of St. Louis," approved February 8, 1839, have and enjoy, during the continuance of this act, the sole and exclusive privilege and right of lighting the same, and of making and vending gas, gas-lights, gas-fixtures, and of any substance or material that may be now or hereafter used as a substitute therefor; and to that end, may establish and lay down in said portion of said corporate limits all pipes, fixtures, or other thing properly required, in order to do the same (the same to be done with as much dispatch and as little inconvenience to the public as possible), and

shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company.

SEC. 6. The city of St. Louis and said company may make any contracts they may deem to their mutual advantage, in regard to the lighting of any parts of said portion of said corporate limits, or any other thing relating to the business and affairs of said company. The said city shall have the right, at the expiration of twenty years from the time of the organization of said company, under this charter, to purchase all the property and effects of the same, paying therefor to the same the value of such property and effects, with twenty per cent. added thereto, such value to be fixed by two appraisers, one to be chosen by the city and the other by the company, and if they cannot agree, then the two thus chosen shall nominate a third man, and a decision of any two of the three shall be binding; and upon such purchase being made, all such property and effects, and all rights and privileges granted to said company shall immediately pass to and vest in said city. If said city fail so to purchase said property and effects, then this charter shall be and the same is hereby renewed and extended for the further period of thirty years after the expiration hereof.

SEC. 7. Any person or body corporate who shall, within said portion of said corporate limits, interfere with the privileges hereby granted to said company, or exercise like acts or privileges, shall, for every such offense, forfeit and pay to said company one thousand dollars, and each day's continuance of such offense shall be construed to be, and be, a new offense, under this section.

SEC. 8. The said company and this act is hereby exempted from the operation of sections 6, 7, 13, 14, 15, 18, and 20, of article first of the act entitled "An act concerning corporations," approved November 23, 1855.

SEC. 9. This act shall take effect from its passage, and shall continue in force thirty years.

Approved March 2, 1857.

An act supplementary and amendatory of an act entitled "An act to incorporate the Laclede Gas Light Company."

Be it enacted by the General Assembly of the State of Missouri, as follows:

SEC. 1. The act to which this act is amendatory is hereby amended as that the words "sole and exclusive," in the fifth section of the act are stricken out.

SEC. 2. The city of St. Louis shall not be compelled, in any purchase which it may make under the sixth section of the before-recited act, to pay more than the appraised value of the property and effects of the corporation created by said act, without any addition of percentage.

This act to take effect and be in force from and after its passage.

Approved March 3, 1857.

An act to amend an act to incorporate the Laclede Gas Light Company, approved March 2d, 1857.

Be it enacted by the General Assembly of the State of Missouri, as follows:

12 SEC. 1. The said Laclede Gas Light Company shall, and may within the corporate limits of the city of St. Louis, as the same are now or may hereafter be established, exercise, have, hold, and enjoy forever, all the rights, privileges, and franchises granted to it by the fifth section of the act to which this act is amendatory, and may at any time lease, sell or dispose of any portion of said rights, privileges and franchises to individuals, associations or corporations, intending or desiring to exercise the same within any portion of the limits aforesaid.

SEC. 2. The capital stock of said company may be increased from time to time to such amount as may be necessary to carry on its business.

SEC. 3. Nothing in this act contained shall be construed as affecting the vested rights of the St. Louis Gas Light Company, and the sixth section of the said act to which this act is amendatory, is hereby repealed.

SEC. 4. An act entitled An act supplementary to and amendatory of an act entitled An act to incorporate the Laclede Gas Light Company, approved March 3, 1857, is hereby repealed.

SEC. 5. This act shall take effect from its passage.

Approved March 26th, 1868.

Said relator further shows to the court that said act of March 2d, 1857, as amended by said subsequent acts, constitutes the present charter of relator, which charter it has duly accepted, under which it has organized and carried on business, and which is in full force and effect; that by said charter relator is granted the privilege and right of lighting the city of St. Louis throughout its corporate

13 limits, and of making and vending gas, gas-lights, gas-fixtures, and any substance or material that may be now or hereafter used as a substitute therefor; and to that end may establish and lay down in any portion of said corporate limits all pipes, fixtures, or other thing properly required in order to do the same, with this limitation only, that in laying down pipes, fixtures, or other thing properly required therefor relator shall do the same with as much dispatch and as little inconvenience to the public as possible.

Any by said charter relator is vested with all other powers necessary to execute and carry out the privileges and powers expressly granted to it; but relator further states and shows to the court that on the 28th day of February, 1873, a certain agreement, known as the "tripartite agreement," was made and executed by and between the city of St. Louis, the St. Louis Gas Light Company, and the Laclede Gas Light Company, to wit, this relator, in and by which agreement, for certain valuable considerations therein set forth, this relator abandoned and surrendered any and all exclusive rights and all claims or pretences of claims of sole or exclusive privilege

or right of lighting any part of the city of St. Louis with gas or making or vending gas, gas-lights, or gas-fixtures, and also all exclusive right whatsoever under its said charter.

Relator further states that in pursuance of the terms of said charter it has for a long time past been engaged in the lighting business, both by gas and electricity; that under a contract with the city of St. Louis it is lighting a part of the public streets
14 and alleys of said city by electricity and will be obliged to do so for a number of years to come; that it is furnishing light by means of gas or electricity to many thousand private consumers in said city, being a large part of the inhabitants thereof; that in order to fulfill its obligations to the city and the public under its charter it has erected and maintains extensive and costly plants for the manufacture and distribution of gas as well as for generating and distributing electric currents; that for distributing gas it has from time to time constructed and maintained and now maintains a system of pipes laid under ground along the streets of the city of St. Louis as it was at all times authorized to do by its said charter, nor has the city of St. Louis ever objected to its so doing or disputed relator's right to do so; that for the distribution of electricity relator has hitherto used overhead wire strung upon poles along the streets and alleys of said city, which poles and electric wires have been and are maintained and used by relator without objection by said city or the authorities thereof for the distribution of electricity, as well to furnish light to private consumers as for the fulfilment by relator of its said contract with said city of St. Louis for the lighting by electricity of certain public streets and alleys thereof; that to effect such distribution it is necessary to transmit through and by means of said wires electric currents of great power, which if and when accidentally diverted are dangerous to human life and property; that in order to avoid the increasing inconvenience and danger to the public necessarily incident to that method of distributing electric currents and in order to provide more effective and proper service relator has made arrangements to lay its wires underground along and under the streets of said city accord-
15 ing to approved and practicable plans, and is now ready to do so with as much dispatch and as little inconvenience to the public as possible.

Relator states that Michael J. Murphy is and was at or before the time hereinafter referred to street commissioner of the city of St. Louis, duly appointed, qualified, and acting as such under its charter, and as such are committed to him under said charter the supervision and control of the streets and alleys of said city and the enforcement of city ordinances relating thereto.

Relator further states that, having completed its preparation to carry out the work above indicated and having given previous notice of its intention to do so to the said street commissioner of the city of St. Louis, it did, on the 30th day of October, 1894, proceed with a number of men required for that purpose to begin the work of excavating at a point on the east side of Broadway, being one of the public streets of said city, near the corner of Mound street, the

said point being adjacent to relator's generating plants, which work of excavating was proper and necessary for placing its wires under ground, whereupon a police force of the city of St. Louis, acting under the instruction and at the instigation and request of said Michael J. Murphy, respondent, who was therein acting as street commissioner of said city, stopped relator's men from proceeding with said work and caused relator's employés engaged in said work to be arrested, and said street commissioner, respondent herein, notified relator that he would not allow any part of any street of said city to be excavated for any purpose whatever without a permit, previously obtained from him for that purpose, as pro-

16 vided by ordinance; and relator states that by section 568, article I, chapter 15, of the Revised Ordinance, 1887, of said city of St. Louis, it is provided that "no person shall make or cause to be made any excavation on any public street, highway, or alley without written permission of the street commissioner so to do, excepting public work under the authority of the water or sewer commissioner, who at the time of ordering any such excavating shall notify the street commissioner of the same."

That upon being so notified by said respondent, street commissioner as aforesaid, relator applied to said respondent as such street commissioner for a permit to make the necessary excavation on Broadway, so that it might lay its wires under ground for the purposes aforesaid and in pursuance of its said charter rights and privileges, but said street commissioner arbitrarily, unlawfully, and contrary to his duty as such street commissioner in that behalf, refused and still refuses to issue to relator any permit to excavate any part of any street of said city for said purpose, and also refused and still refuses to let relator make any such excavation without a permit, and threatens and still threatens to cause the arrest of any person who might thereafter enter upon or begin any such excavation for said purpose of laying any wire of relator's under ground, so that relator has been and is by said street commissioner absolutely prevented from exercising one of its vested rights granted by the State of Missouri and hitherto exercised by relator without let or hindrance, viz., to lay down in the streets of St. Louis all pipes, fixtures, or other thing properly required in order to carry on the business for which relator's corporation was organized.

17 Relator states and shows to the court that it was and is the duty of said Michael J. Murphy, as such street commissioner of the city of St. Louis, to issue to it, said relator, a permit such as by it applied for as aforesaid, so that relator may without interference by the police or other authorities of said city exercise its charter powers and rights in that behalf above mentioned.

And relator states that by reason of the premises relator has been and is entirely without remedy in the premises unless it be afforded by the interposition of this honorable court by its writ of mandamus, and it therefore prays that a writ of mandamus may issue against said Michael J. Murphy, street commissioner of the city of St. Louis, commanding him to issue a permit to the relator to make an excavation along the east side of Broadway as near the curb as practi-

cable, and extending from the southeast corner of Mound street and Broadway to the southeast corner of Olive street and Broadway, in so far as such excavation may be necessary for the purpose of laying relator's electric wires under ground, the same to be done with as much dispatch and as little inconvenience to the public as possible; and relator prays for such other process, orders, and remedies as may to the court seem meet and proper.

THE LACLEDE GAS LIGHT COMPANY,
By ISAAC H. LIONBERGER, *Vice-President.*

HENRY HITCHCOCK,
LIONBERGER & SHEPLEY AND
G. A. FINKELNBURG,
Attorneys for Relator.

18 STATE OF MISSOURI, } ss:
City of St. Louis, }

Isaac H. Lionberger, undersigned, being first duly sworn, on his oath states that the affiant is the vice-president of The Laclede Gas Light Company, the petitioner and relator in this behalf; that affiant has read the foregoing petition and knows the contents thereof, and that the several matters and things in said petition set forth are true to the best of his knowledge and belief.

ISAAC H. LIONBERGER.

Subscribed and sworn to before me this Nov. 23rd, 1894.

[SEAL.] GEORGE M. BLOCK,
Notary Public.

Term expires June 28, 1897.

Which suggestions in support of and in opposition to said writ are as follows, to wit:

In the Supreme Court of Missouri, October Term, 1894.

In the Matter of the LACLEDE GAS LIGHT COMPANY.

To the honorable the judges of the supreme court of the State of Missouri:

Representing the city of St. Louis and its street commissioner, M. J. Murphy, I have no objection to the issuance of an alternative writ of mandamus in this case, except subject to the qualifications hereinafter stated.

I.

19 I think the writ should run against The City of St. Louis in its corporate capacity and not against a mere officer thereof.

It may be questioned whether it would be proper for this court to issue a writ against a municipal officer, he not being such an officer as would be entitled to apply for it himself and the relator not being

possessed of the constitutional qualifications which entitle it to ask for a writ from this court.

The petition states no cause of action which gives this court jurisdiction as against a mere city officer, whereas such would be the case if the application was against the city, a political subdivision of the State.

It is eminently proper that the city should be the defendant in any litigation such as is involved in this application. The street commissioner may, possibly will, be changed before the determination of this litigation (Mr. Murphy's term of office expiring next April), so that when the final writ is issued it would run against one who would not probably be the proper officer to comply with the order; hence, if this application is changed so as to make the city the defendant, my objection to the issuance of the writ by this court for this reason will be overcome.

II.

In case such a change is made and the alternative writ is issued, I think the defendant ought to be allowed at least thirty days in which to make return to the writ.

My reasons for this suggestion are that the questions involved in this case are of the utmost importance and magnitude to the city of St. Louis.

20 The relator practically claims to have the right to fill the streets of St. Louis with one or more subways or conduits, as in its judgment may be necessary to transact the business it claims it has a right to transact under its charter, this, too, notwithstanding the space occupied by the streets is limited and the city is vitally interested in the space for the purposes of putting in sewer pipes, water pipes, and the manifold uses to which the subsurface of a street in modern times is subjected.

Granting the application of the relator would amount to a vast monopoly, for a monopoly of space in a street is as effectual in excluding competition as a monopoly of a patent would be in excluding other competitors.

III.

The proper determination of the issues that will arise in this case will necessitate the taking of volumes of testimony, both in Missouri, in the United States, and in foreign countries, particularly in Germany. Vital questions of fact will have to be settled, as well as questions of law. This is particularly true as to the proper meaning to be applied to that portion of sec. 5 of the act of 1857 which authorized relator to exercise the privilege of making and vending "any substance or material that may be now or hereafter used as a subtitute therefor" (meaning gas). A question of fact will thereby arise as to whether this grant of power meant that relator should have the right — construct conduits, subways, &c., for the purpose of supplying electricity for lighting purposes, when lighting by electricity was wholly unknown to art in 1857; also whether electricity

is a substance or material in any sense in which those words
21 were known or used by the law-makers in 1857 or at the present date.

A further inquiry of fact will arise in regard to whether or not the charter of relator expired in 1887—that is, thirty years after the date of the act of 1857—and also whether the act of 1868 is a valid act under the constitution of 1865; also whether relator organized and commenced the transaction of its business within one year from the time the act of 1857 went into effect, as required by par. 2, sec. 1, art. 8, of the constitution of 1865; also the question of whether sec. 2721, Rev. Stats. 1885 (being part of art. 5, chap. 42), which authorized the putting of wires underground, but provides that the same shall not be placed underground in any city unless the company "first obtain the consent of such city through the municipal authorities thereof," is not a legal restriction or alteration upon the powers granted the relator by the act of 1857 and the act of 1868 (if the act of 1868 is a valid act in view of the law as it existed in Missouri in 1855, which gave the legislature the right to alter or amend charters whenever it shall be deemed conducive to *be* public good so to do).

These suggestions are sufficient to impart to the court a slight conception of the importance of this litigation and of the necessity of giving the relator time enough to formulate in proper shape its defense, and also time enough to prepare for trial. The relator, of course, has had all the time it and its eminent counsel deemed necessary before beginning this litigation, and the city ought to have such time as will reasonably enable it to examine relator's contentions, its available defenses, and for the preparation of the case for trial.

Respectfully submitted.

W. C. MARSHALL,
Att'y for the City of St. Louis and M. J. Murphy.

22 In the Supreme Court of the State of Missouri.

In the Matter of the Petition of THE LACLEDE GAS LIGHT COMPANY for a Mandamus
vs.
MICHAEL J. MURPHY, Street Commissioner of the City of St. Louis.

Petitioner respectfully submits to this honorable court that the question involved in the accompanying petition for a mandamus is one of public interest and affects the inhabitants of the city of St. Louis generally; that it is of importance to the public as well as to petitioner to have the matter passed upon by the court of last resort in this State, and that an application to the local courts of St. Louis, followed by an appeal to this court, would cause a delay of about two years.

It was presumably for similar reasons that this court entertained a mandamus against petitioner in State *ex rel. vs.* Laclede Gas Light Co., 102 Mo., 472.

This court entertained an application for a mandamus in State *ex rel. vs.* Weeks, 93 Mo., 499, to compel the issuance of a dram-shop license.

In State *ex. rel. vs.* Newman, 91 Mo., 445, to compel the aldermen of Pierce City to direct the clerk to issue a certificate of election.

In State *ex rel. vs.* Williams, 96 Mo., 13, to permit an inspection of registration books.

In State *ex rel vs.* Williams, 99 Mo., 291, to compel the recorder of voters of the city of St. Louis to issue a certificate of election to relator as marshall of said city.

In State *ex rel. vs.* Board of Health, 103 Mo., 24, to compel the issuance of a certificate to practice medicine.

23 In State *ex rel. vs.* May, 106 Mo., 488, to compel the superintendent of streets of Kansas City to turn over certain office furniture and public records.

In State *ex rel. v.* Tracey, 94 Mo., 217, to compel the register of the city of St. Louis to extend a four-mile tax for school purposes upon the tax books.

Since writing the above I have read Mr. Marshall's suggestions to the court and desire to add the following:

The suggestion that the City of St. Louis should be made a party defendant in its corporate capacity in order to give this court undoubted jurisdiction seems to be based on the theory that the supreme court cannot issue a writ of mandamus except in matters falling within its appellate jurisdiction. This is erroneous. This court has decided otherwise in State *ex rel. vs.* Tracey, 94 Mo., 217. Besides, Mr. Marshall himself suggests that a constitutional question is involved in this case.

Nor ought petitioner to be prejudiced by the fact that the term of office of the defendant may possibly expire before this case is finally disposed of. If necessary, his successor may be substituted (see sect. 2300, Rev. St.), but even this would probably be unnecessary, for I apprehend that whatever this court will finally decide as to the relative rights of this city and the petitioner that decision will be followed by the city authorities without compulsory process on a particular officer who is technically the defendant.

The reason why the city was not formally made a party defendant to this proceeding was that it seemed improper to ask the writ to issue against the municipal corporation as a whole and

24 because it seemed more proper to counsel that the writ should be directed against the officer who is requested to perform the official duty sought to be enforced, and such is believed to be the usual practice in cases of this kind.

As to the questions of fact said to be involved in this case, strictly speaking, there are none. If defendant desires to aid the court in construing the language of petitioner's charter by taking testimony as to the meaning of certain words and this court is willing to receive such testimony, nevertheless the point to be decided remains a question of law for a court to pass on under pertinent rules of construction.

Petitioner claims no monopoly. It simply desires to lay its own

wires under ground. In doing so it not only seeks to exercise a charter right, but it is also responding to a general public demand on this subject.

Respectfully submitted by—

G. A. FINKELNBURG,
For Petitioner.

And afterwards, to wit, on the 30th day of November, 1894, the relator files its further suggestions, which are in words and figures as follows, viz:

In the Supreme Court of Missouri, October Term, 1894.

In the Matter of THE LACLEDE GAS LIGHT COMPANY, Relator.

Petition for Alternative Writ of Mandamus.

To the honorable the judges of the supreme court of Missouri:

The undersigned, of counsel for the Laclede Gas Light Company, respectfully submit the following further suggestions in reply to those submitted by City Counsellor Marshall:

25 The only question before the court is—

Whether this court, therein exercising its unquestioned original jurisdiction, will take cognizance of this application and direct an alternative writ to issue, or will decline to take jurisdiction thereof and remit petitioner to the circuit court.

In State *ex rel. v.* Tracy, 94 Mo., 220, '21, this court said:

"The grant of power to this court to hear and determine writs of mandamus is without qualification, and none exists in the nature of the proceeding. The practice of this court is to decline to issue such writs unless the case is one of more than ordinary importance; but that is a rule of expediency and does not affect the jurisdiction of this court."

Other cases referred to in the memorandum already submitted by Mr. Finkelnburg indicate the class of cases which this court has deemed of sufficient importance for the exercise of its original jurisdiction in order to a speedy determination of the controversy.

The undersigned submit that the suggestions presented by the city counsellor are, for the most part, not germane to the question whether this court will take jurisdiction of this case, but relate rather to questions which can properly arise only after the issue of an alternative writ.

I.

For example, whether the street commissioner, in his official capacity, or the City of St. Louis, as a corporation, should be made defendant in order to obtain the specific relief sought by the relator is clearly not a question of expediency, but of parties to the

26 suit, which cannot properly be determined by the court until suit is brought by issuing the writ.

Relator is advised that the street commissioner and not the City of St. Louis is the proper defendant for the purpose of this application, and is prepared, but only at the proper time and in the proper manner, to submit that question to the court. Mr. Marshall's suggestion that a writ of mandamus from this court will not run against a "mere officer" of a municipal corporation is clearly erroneous, as will sufficiently appear from the case of State *ex rel. v.* May, 106 Mo., 488, in which this court entertained an application for mandamus against the street commissioner of Kansas City as such; also the two cases of State *ex rel. v.* Williams, 96 Mo., 13, and 99 Mo., 291, in which the defendant was the recorder of voters of the city of St. Louis. The suggestion that the term of office of the present street commissioner of St. Louis may expire before the termination of this controversy is also without merit, for the reasons already suggested by Mr. Finkelnburg.

II.

To the suggestion that, because of the great importance of the case to the city of St. Louis and its inhabitants generally, at least thirty days should be allowed the defendant to make return to the alternative writ, the relator interposes no objection; but if the importance and magnitude of the questions involved are a reason why the defendant should have the usual time to prepare its return, they also bring the case within the class of cases of which this court will take jurisdiction precisely on that ground.

27 The further suggestion that the relator by this application claims "a vast monopoly" in the streets of St. Louis is certainly not germane to the question now before the court. That the relator does not claim a monopoly its petition shows. On the contrary, it distinctly disclaims and exclusive right under its charter. But this suggestion, though both unfounded and prematurely made, also emphasizes the importance attached by the officers of the city of St. Louis to this controversy and the consequent propriety of the relator's application to this court.

III.

It is further suggested by the city counsellor as an objection to the granting by this court of the alternative writ that the proper determination of the issues of fact that will arise in this case will necessitate the taking of much testimony not only in Missouri, but elsewhere in the United States and in Germany; but this court has never hesitated on that ground to take jurisdiction of a case whose importance otherwise justified the issue of the writ. In State *ex rel. v.* Williams, 99 Mo., 291, 294, in which relator sought to compel the issue to him by the recorder of voters of St. Louis a certificate of election as marshal of said city, the report shows that a very large amount of testimony was taken on both sides by depositions authorized by the order of this court, and upon that testimony the case was decided. It is evident that the testimony which the city counsellor thinks must be taken in this case can be taken only by depositions. Certainly the court can in this case, as it did in the Williams

case, quite as easily pass upon testimony taken by its own authority as upon testimony taken under a commission issued from the circuit court and preserved in the transcript of the record
28 brought here on appeal. It will be observed, however, that some of the questions mentioned by the city counsellor as "questions of fact" are not questions of fact, but plainly questions of law; for example, "whether this grant of power," namely, the provision in the relator's charter authorizing it to use any substitute for gas, "meant that relator should have the right to construct conduits," &c., is clearly a question not of fact, but of the proper construction of said charter; but this suggestion also is obviously premature and irrelevant to the question now before the court, since it anticipates issues which may or may not be presented in the case; and even if the determination of the controversy should involve, as suggested by the city counsellor, an inquiry "whether electricity is a substance or material in any sense in which those words were known or used by the law-makers in 1857 or at the present date," and if the defendant should be permitted by the court to aid it in construing relator's charter by taking testimony on that subject, and if also it were assumed that whether the court should grant such permission, a question which this court would consider at this stage of the proceeding, still the undersigned submit that these considerations also emphasize the propriety of this application and furnish additional reasons why the final determination of questions which the city counsellor deems so important to the city and its inhabitants should not be still further delayed by requiring the relator to begin its proceedings in the circuit court.

HENRY HITCHCOCK,
I. H. LIONBERGER,
G. A. FINKELNBURG,
Of Counsel for Relator.

29 And afterwards, to wit, on the 10th day of December, 1894, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* LACLEDE GAS LIGHT CO., Rel.,
v.
M. J. MURPHY, Resp.

Now, at this day, the court, having fully considered and understood the application heretofore made for an alternative writ of mandamus herein, doth order that said rule issue, directed to said respondent, returnable on the 14th day of January, 1895.

Which said alternative writ of mandamus is in words and figures as follows, to wit:

In the Supreme Court of Missouri, Division No. 1, October Term, 1895.

THE STATE OF MISSOURI on the Relation of THE LACLEDE GAS LIGHT COMPANY,
vs.
MICHAEL J. MURPHY, Street Commissioner of the City of St. Louis, Respondent.

The State of Missouri to Michael J. Murphy, street commissioner of the city of St. Louis:

Whereas the said Laclede Gas Light Company, lately in our supreme court, at the October term, 1894, thereof, held at the city of Jefferson, on the 26th day of November, 1894, gave the same court to understand and be informed, to wit, by the petition of said relator, verified by affidavit, filed in said court on said day, that you, the said Michael J. Murphy, street commissioner of the city of St.
30 Louis, have arbitrarily, unlawfully, and contrary to your duty in that behalf, refused and still refuse to issue to said relator a certain permit by said relator applied for, as will more fully appear by reference to said petition, which is in words and figures following, to wit:

To the honorable judges of the supreme court of the State of Missouri:

The Laclede Gas Light Company, relator herein, gives the court to understand and be informed that it, the said relator, is a body politic duly incorporated by an act of the General Assembly of the State of Missouri, approved March 2d, 1857, entitled "An act to incorporate the Laclede Gas Light Company;" that subsequently said act of March 2d, 1857, was amended by certain supplemental and mandatory acts, viz., "An act supplementary and amendatory of an act entitled 'An act to incorporate the Laclede Gas Light Company,'" approved March 3d, 1857, and "An act to amend an act to incorporate the Laclede Gas Light Company," approved March 26th, 1868; which said three acts of the General Assembly of the State of Missouri are in words and figures as follows:

An act to incorporate the Laclede Gas Light Company.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SEC. 1. James M. Hughes, Edward Bredell, Robert Holmes, John C. Rust, Charles Gibson, Samuel H. Gardner, Henry A. Clover, and Archibald Gamble be, and they are hereby created and constituted a body politic and corporate, by the style of "The Laclede Gas Light Company," and by that name they and their successors and assigns shall have perpetual succession, may contract and be contracted with, sue and be sued, and may also hold and con-
31 vey, or otherwise manage and dispose of such property, real, personal and mixed, as may be necessary for the purpose of the said corporation and the prosecution of its legitimate business.

SEC. 2. The capital stock of said company shall be fifty thousand dollars, and the same may be increased to two million dollars, which shall be divided into shares of one hundred dollars each.

SEC. 3. The affairs of said company shall be conducted by a board of not less than five directors, and such officers and agents as they may deem necessary; said directors to be chosen annually by the stockholders, each share of stock being entitled to one vote in such election, and they shall hold their offices for one year, and until their successors are elected and qualified; said directors shall have power to ordain and make all needful by-laws, rules and regulations, for the transaction of the business of said company, and, under the direction of the stockholders, may have absolute power over all the property and effects of said company. They may also fill vacancies in their board until the next regular election.

SEC. 4. The said corporators, or a majority of them, may at any time, open books in the city of St. Louis, for subscription to the capital stock of said company, and, upon the sum of fifty thousand dollars being subscribed, may organize said company under this charter.

SEC. 5. The said company, its successors and assigns, shall within all that portion of the present corporate limits of the city of St. Louis, in St. Louis county, not embraced within the corporate
32 limits of said city, as established by the act entitled "An act to incorporate the city of St. Louis," approved February 8, 1839, have and enjoy, during the continuance of this act, the sole and exclusive privilege and right of lighting the same, and of making and vending gas, gas-lights, gas-fixtures, and of any substance or material that may be now or hereafter used as a substitute therefor; and to that end, may establish and lay down in said portion of said corporate limits, all pipes, fixtures, or other thing properly required, in order to do the same (the same to be done with as much dispatch and as little inconvenience to the public as possible), and shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company.

SEC. 6. The city of St. Louis and said company may make any contracts they may deem to their mutual advantage, in regard to the lighting of any parts of said portion of said corporate limits, or any other thing relating to the business and affairs of said company. The said city shall have the right, at the expiration of twenty years from the time of the organization of said company, under this charter, to purchase all the property and effects of the same, paying therefor to the same the value of such property and effects, with twenty per cent. added thereto, such value to be fixed by two appraisers, one to be chosen by the city and the other by the company, and if they cannot agree, then the two thus chosen shall nominate a third man, and a decision of any two of the three shall be binding; and upon such purchase being made, all such property and effects, and all rights and privileges granted to said company shall immediately pass to and vest in said city. If said

city fail so to purchase said property and effects, then this
33 charter shall be and the same is hereby renewed and extended for the further period of thirty years after the expiration hereof.

SEC. 7. Any person or body corporate who shall, within said portion of said corporate limits, interfere with the privileges hereby granted to said company, or exercise like acts or privileges, shall, for every such offense, forfeit and pay to said company one thousand dollars, and each day's continuance of such offense shall be construed to be, and be, a new offense, under this section.

SEC. 8. The said company and this act is hereby exempted from the operation of sections 6, 7, 13, 14, 15, 18, and 20, of article first of the act entitled "An act concerning corporations," approved November 23, 1855.

SEC. 9. This act shall take effect from its passage, and shall continue in force for thirty years.

Approved March 2, 1857.

An act supplementary and amendatory of an act entitled "An act to incorporate the Laclede Gas Light Company."

Be it enacted by the General Assembly of the State of Missouri, as follows:

SEC. 1. The act to which this act is amendatory is hereby amended as that the words "sole and exclusive," in the fifth section of the act are stricken out.

SEC. 2. The city of St. Louis shall not be compelled, in any purchase which it may make under the sixth section of the before-recited act, to pay more than the appraised value of the property and effects of the corporation created by said act, without any addition of percentage.

This act to take effect and be in force from and after its
34 passage.

Approved March 3, 1857.

An act to amend an act to incorporate the "Laclede Gas Light Company," approved March 2d, 1857.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SEC. 1. The said "Laclede Gas Light Company" shall, and may within the corporate limits of the city of St. Louis, as the same are now or may hereafter be established, exercise, have, hold, and enjoy forever, all the rights, privileges, and franchises granted to it by the fifth section of the act to which this act is amendatory, and may at any time lease, sell or dispose of any portion of said rights, privileges and franchises to individuals, associations or corporations, intending or desiring to exercise the same within any portion of the limits aforesaid.

SEC. 2. The capital stock of said company may be increased from time to time to such amount as may be necessary to carry on its business.

SEC. 3. Nothing in this act contained shall be construed as affecting the vested rights of the St. Louis Gas Light Company, and the sixth section of the said act to which this act is amendatory, is hereby repealed.

SEC. 4. An act entitled "An act supplementary to and amendatory of an act entitled An act to incorporate the Laclede Gas Light Company," approved March 3d, 1857, is hereby repealed.

SEC. 5. This act shall take effect from its passage.

Approved March 26th, 1868.

35 Said relator further shows to the court that said act of March 2d, 1857, as amended by said subsequent acts, constitutes the present charter of relator, which charter it has duly accepted, under which it has organized and carried on business, and which is in full force and effect; that by said charter relator is granted the privilege and right of lighting the city of St. Louis throughout its corporate limits, and of making and vending gas, gas-lights, gas-fixtures, and any substance or material that may be now or hereafter used as a substitute therefor; and to that end may establish and lay down in any portion of said corporate limits all pipes, fixtures, or other thing properly required in order to do the same, with this limitation only, that in laying down pipes, fixtures, or other thing properly required therefor relator shall do the same with as much dispatch and as little inconvenience to the public as possible.

And by said charter relator is invested with all other powers necessary to execute and carry out the privileges and powers expressly granted to it; but relator further states and shows to the court that on the 28th day of February, 1873, a certain agreement, known as the "tripartite agreement," was made and executed by and between the city of St. Louis, the St. Louis Gas Light Company, and the Laclede Gas Light Company, to wit, this relator, in and by which agreement, for certain valuable considerations therein set forth, this relator abandoned and surrendered any and all exclusive rights and all claims or pretences of claims of sole or exclusive privilege or right of lighting any part of the city of St. Louis with gas or making or vending gas, gas-lights, or gas-fixtures, and also
36 all exclusive right whatsoever under its said charter.

Relator further states that in pursuance of the terms of said charter it has for a long time past been engaged in the lighting business, both by gas and electricity; that under a contract with the city of St. Louis it is lighting a part of the public streets and alleys of said city by electricity and will be obliged to do so for a number of years to come; that it is furnishing light by means of gas or electricity to many thousand private consumers in said city, being a large part of the inhabitants thereof; that in order to fulfill its obligations to the city and the public under its charter it has erected and maintains extensive and costly plants for the manufacture and distribution of gas as well as for generating and distributing electric currents; that for distributing gas it has from time to time constructed and maintained and now maintains a system of pipes laid under ground along the streets of

the city of St. Louis, as it was at all times authorized to do by its said charter, nor has the city of St. Louis ever objected to its so doing or disputed relator's right to do so; that for the distribution of electricity relator has hitherto used overhead wire strung upon poles along the streets and alleys of said city, which poles and electric wires have been and are maintained and used by relator without objection by said city or the authorities thereof for the distribution of electricity, as well to furnish light to private consumers as for the fulfilment by relator of its said contract with said city of St. Louis for the lighting by electricity of certain public streets and alleys thereof; that to effect such distribution it is necessary to
37 transmit through and by means of said wires electric currents of great power, which if and when accidentally diverted are dangerous to human life and property; that in order to avoid the increasing inconvenience and danger to the public necessarily incident to that method of distributing electric currents and in order to provide more effective and proper service relator has made arrangements to lay its wires under ground along and under the streets of said city according to approved and practicable plans, and is now ready to do so with as much dispatch and as little inconvenience to the public as possible.

Relator states that Michael J. Murphy is and was at or before the time hereinafter referred to street commissioner of the city of St. Louis, duly appointed, qualified, and acting as such under its charter, and as such are committed to him under said charter the supervision and control of the streets and alleys of said city and the enforcement of city ordinances relating thereto.

Relator further states that, having completed its preparation to carry out the work above indicated and having given previous notice of its intention to do so to the said street commissioner of the city of St. Louis, it did, on the 30th day of October, 1894, proceed with a number of men required for that purpose to begin the work of excavating at a point on the east side of Broadway, being one of the public streets of said city, near the corner of Mound street, the said point being adjacent to relator's generating plants, which work of excavating was proper and necessary for placing its wires under ground; whereupon a police force of the city of St. Louis,
38 acting under the instruction and at the instigation and request of said Michael J. Murphy, respondent, who was therein acting as street commissioner of said city, stopped relator's men from proceeding with said work and caused relator's employés engaged in said work to be arrested, and said street commissioner, respondent herein, notified relator that he would not allow any part of any street of said city to be excavated for any purpose whatever without a permit, previously obtained from him for that purpose, as provided by ordinance; and relator states that by section 568, article 1, chapter 15, of the Revised Ordinance, 1887, of said city of St. Louis, it is provided that "no person shall make or cause to be made any excavation on any public street, highway, or alley without written permission of the street commissioner so to do, excepting public work done under the authority of the water or sewer commissioner, who

at the time of ordering any such excavating shall notify the street commissioner of the same."

That upon being so notified by said respondent, street commissioner as aforesaid, relator applied to said respondent as such street commissioner for a permit to make the necessary excavation on Broadway, so that it might lay its wires under ground for the purposes aforesaid and in pursuance of its said charter rights and privileges, but said street commissioner arbitrarily, unlawfully, and contrary to his duty as such street commissioner in that behalf, refused and still refuses to issue to relator any permit to excavate any part of any street of said city for said purpose, and also refused and still refuses to let relator make any such excavation without a permit, and threatens and still threatens to cause the arrest of any person who might thereafter enter upon or begin any such
39 excavation for said purpose of laying any wire of relator's under ground, so that relator has been and is by said street commissioner absolutely prevented from exercising one of its vested rights granted by the State of Missouri and hitherto exercised by relator without let or hindrance, viz., to lay down in the streets of St. Louis all pipes, fixtures, or other thing properly required in order to carry on the business for which relator's corporation was organized.

Relator states and shows to the court that it was and is the duty of said Michael J. Murphy, as such street commissioner of the city of St. Louis, to issue to it, said relator, a permit such as by it applied for as aforesaid, so that relator may without interference by the police or other authorities of said city exercise its charter powers and rights in that behalf above mentioned.

And relator states that by reason of the premises relator has been and is entirely without remedy in the premises unless it be afforded by the interposition of this honorable court by its writ of mandamus, and it therefore prays that a writ of mandamus may issue against said Michael J. Murphy, street commissioner of the city of St. Louis, commanding him to issue a permit to the relator to make an excavation along the east side of Broadway as near the curb as practicable, and extending from the southeast corner of Mound street and Broadway to the southeast corner of Olive street — Broadway, in so far as such excavation may be necessary for the purpose of laying relator's electric wires under ground, the same to be done with as much dispatch and as little inconvenience to the public as
40 possible; and relator prays for such other process, orders, and remedies as may to the court seem meet and proper.

THE LACLEDE GAS LIGHT COMPANY,
By ISAAC H. LIONBERGER, *Vice-President.*

HENRY HITCHCOCK,
LIONBERGER & SHEPLEY AND
G. A. FINKELNBURG,
Att'ys for Relator.

STATE OF MISSOURI, }
City of St. Louis, } ss:

Isaac H. Lionberger, undersigned, being first duly sworn, on his oath states that affiant is the vice-president of The Laclede Gas Light Company, the petitioner and relator in this behalf; that affiant has read the foregoing petition and knows the contents thereof, and that the several matters and things in said petition set forth are true to the best of his knowledge and belief.

ISAAC H. LIONBERGER.

Subscribed and sworn to before me this Nov. 23d, 1894.

[NOTARY'S SEAL.] GEORGE M. BLOCK,
Notary Public.

Term expires June 28, 1897.

And whereas, upon consideration thereof, it was ordered that an alternative writ of mandamus should issue:

Now, therefore, you, Michael J. Murphy, street commissioner of the city of St. Louis, are hereby commanded to forthwith issue
41 to the said Laclede Gas Light Company a permit to make an excavation along the east side of the public street called Broadway, in the city of St. Louis, State of Missouri, as near the curb as practicable, and extending from the southeast corner of said Broadway and Mound street to the southeast corner of Broadway and Olive street, in said city, so far as such excavation may be necessary for the purpose of laying under ground the electric wires of said Laclede Gas Light Company, the same to be done with as much dispatch and as little inconvenience to the public as possible, or that you show cause before this court on the 14th day of January, A. D. 1895, why you refuse to do so.

Witness the Honorable Francis M. Black, chief justice of the supreme court of Missouri, the 10th day of December, A. D. 1894. Issued at office, in the city of Jefferson, State of Missouri, under the seal of the said court, the day and year last aforesaid.

[SEAL.] JNO. R. GREEN,
Clerk of said Court.

I acknowledge service of the foregoing writ of mandamus and waive service by an officer.

M. J. MURPHY,
Street Commissioner.

St. Louis, Mo., December 12th, 1894.

And afterwards, to wit, on the 14th day of January, 1895, the further following proceedings were had in said cause, viz:

42 STATE *ex Rel.* LACLEDE GAS LIGHT CO., Rel., }
v.
M. J. MURPHY, Resp. }

Comes now the said respondent, by attorney, and files his return to the alternative writ of mandamus heretofore issued herein, and,

upon motion, the said relator is granted 10 days in which to plead to said return.

Which said return is in words and figures as follows, to wit:

In the Supreme Court of Missouri, October Term, 1894.

STATE OF MISSOURI *ex Rel.* THE LACLEDE GAS LIGHT CO., Relator,
vs.
M. J. MURPHY, Street Commissioner of the City of St. Louis, Respondent.

Now comes said respondent, and for return to the alternative writ of mandamus heretofore issued in this case, commanding respondent to show cause why he refuses to issue a permit to relator to make an excavation along the east side of Broadway, from the southeast corner of Mound street and Broadway to the southeast corner of Olive street, in the city of St. Louis, for the purpose of laying electric wires under ground, respectfully represents and shows unto the court that it is true, as stated by relator, that the General Assembly of Missouri, by an act entitled "An act to incorporate the Laclede Gas Light Company," approved March 2d, 1857, and by an
43 act entitled "An act supplementary and amendatory of an act entitled 'An act to incorporate the Laclede Gas Light Company,'" approved March 3d, 1857, the relator became a body corporate; that it is also true that the General Assembly of Missouri passed an act entitled "An act to amend an act to incorporate 'the Laclede Gas Light Company,'" approved March 26th, 1868.

Respondent further shows unto the court that said act approved March 2nd, 1857, constituted James M. Hughes and seven (7) others a body politic and corporate under the style of "the Laclede Gas Light Company," and provided that "by that name they and their successors and assigns shall have perpetual succession," and that said company "shall within all that portion of the present corporate limits of the city of St. Louis, in St. Louis county, not embraced within the corporate limits of said city as established by an act entitled "An act to incorporate the city of St. Louis," approved February 8th, 1839, have and enjoy during the continuance of this act the sole and exclusive privilege and right of lighting the same and of making and vending gas, gas-lights, gas-fixtures, and of any substance or material that may be now or hereafter used as a substitute therefor, and to that end may establish and lay down in said portion of said corporate limits all pipes, fixtures, or other thing properly required in order to do the same (the same to be done with as much dispatch and as little inconvenience to the public as possible), and shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company;" that by said act it was further provided that "the said city shall have the right, at the expiration of twenty years from the time of the organization of said company under this charter, to pur-
44 chase all the property and effects of the same, paying therefor to the same the value of such property and effects, with

twenty per cent. added thereto, such value to be fixed by two appraisers, one to be chosen by the city and the company, and if they cannot agree, then the two thus chosen shall name a third man, and the decision of any two of the three shall be binding; and upon such purchase being made all such property and effects and all rights and privileges granted to said company shall immediately pass to and vest in said city.

If said city fail so to purchase said property and effects, then this charter shall be and the same is hereby renewed and extended for the further period of thirty years after the expiration hereof:" that it was further provided by said act that said company should be exempted from the operations of secs. 6, 7, 13, 14, 15, 18, and 20 of art. 1 of an act entitled "An act concerning corporations," approved November 23d, 1855; that it was provided by sec. 9 of said act as follows: "This act shall take effect from its passage and shall continue in force for thirty years."

Respondent further shows unto the court that by the supplementary act approved March 3rd, 1857, it was provided that the words "sole and exclusive," in the 5th section of the act approved March 2d, 1857, should be stricken out, and, further, that the city of St. Louis should not be compelled, in any purchase which it might make under the act of March 2nd, 1857, to pay more than the appraised value of the property and effects without any addition of percentage.

Respondent further shows unto the court that the act ap-
45 proved March 26th, 1868, entitled "An act to amend an act to incorporate the Laclede Gas Light Company," approved March 2d, 1857, was as follows:

"SECTION 1. The said 'Laclede Gas Light Company' shall, and may within the corporate limits of the city of St. Louis, as the same are now or may hereafter be established, exercise, have hold and enjoy forever, all the rights, privileges and franchises granted to it by the 5th section of the act to which this act is amendatory, and may at any time lease, sell or dispose of said rights, privileges and franchises to individuals, associations or corporations, intending or desiring to exercise the same within any portion of the limits aforesaid.

SECTION 2. The capital stock of said company may be increased, from time to time, to such amount as may be necessary to carry on its business.

SECTION 3. Nothing in this act contained shall be considered as affecting the vested rights of the St. Louis Gas Light Company, and the sixth section of the said act to which this act is amendatory is hereby repealed.

SECTION 4. An act entitled: 'An act supplementary and amendatory of an act entitled "An act to incorporate the Laclede Gas Light Company,"' approved March 3rd, 1857, is hereby repealed.

SECTION 5. This act shall take effect from its passage."

Respondent further shows unto the court that the said act approved March 26th, 1868, is unconstitutional, null and void, and is in conflict with par. 2 of sec. 1 of art. 8 of the constitution of Mis-

public places which said wires, tubes, or cables are to occupy, and the manner in which said wires, tubes, or cables are to be secured or supported and insolated, together with a plat showing the route of such wires, tubes, and cables, and that thereupon, if the same is approved, the board of public improvements shall grant a permit therefor, subject to such restrictions, regulations, and qualifications as may be prescribed by said board, and all such work shall be done under the supervision of and to the satisfaction of the supervisor of city lighting; and that whenever an alley is available for
50 placing such wires, tubes, or cables the same shall be placed in or under alleys and not along or under streets; that relator has never accepted the provisions of said article and chapter, nor of said ordinance No. 16894, nor has it ever been authorized by the municipal assembly of St. Louis to place its wires, tubes, and cables under the streets or alleys of St. Louis.

Respondent further shows unto the court that said ordinance provisions are legal and binding and valid provisions, and such as the city of St. Louis had the right to adopt and enact under par. 2 of sec. 26 of art. 3 of the charter of St. Louis, which gives said city the power to regulate the use of all streets, avenues, alleys, and so forth, in said city, and such ordinance provisions are legal enactments, notwithstanding any rights which relator now has or may heretofore have had by virtue of any act of the General Assembly of the State of Missouri.

Respondent further shows unto the court that relator has never made application to the board of public improvements for a permit to place its wires, tubes, and cables under ground in said city, nor has it complied in any manner with any of the ordinance provisions aforesaid, and that respondent has not the power to grant any such permit as is asked for by relator in this case.

Respondent further shows unto the court that on the 2nd of March, 1857, lighting by electricity was wholly unknown to art, and that the General Assembly of Missouri, by the act of March 2nd, 1857, did not and did not intend to confer upon relator the right to manufacture electricity for lighting purposes.

Respondent further shows unto the court that it is like-
51 wise true that on the 26th of March, 1868, lighting by electricity was wholly unknown to art, and that the General Assembly of Missouri did not and did not intend to confer upon relator by the act of March 26th, 1868, the right to manufacture and vend electricity for lighting purposes.

Wherefore, having fully made return to the alternative writ herein, respondent asks to be hence dismissed with his costs.

W. C. MARSHALL,
Att'y for Respondent.

And afterwards, to wit, on the 24th day of January, 1895, the said relator files its special demurrer to parts of respondent's return, which is in words and figures as follows, viz:

In the Supreme Court of Missouri, October Term, 1894.

THE STATE OF MISSOURI *ex Relatione* THE LACLEDE GAS LIGHT COMPANY, Relator,
vs.
MICHAEL J. MURPHY, Street Commissioner of the City of St. Louis, Respondent.
No. 7434.

Now comes relator, by its attorneys of record, and demurs specially to the following portions of the return of said respondent to the alternative writ of mandamus issued in this behalf and to each of them—that is to say:

52 1. To that portion of said return beginning, on line 6 of page 4 thereof, with the words "Respondent further shows unto the court that the said act, approved March 26, 1868," and ending, on line 26 of said page 4, with the words "was an act reviving and re-enacting the act of March 2, 1857."

And for grounds of said demurrer relator shows the court—

That the said act approved March 26, 1868, as by the terms thereof appears, is not, nor purports to be, a law reviving or re-enacting any act theretofore passed, and is not, therefore, within the provisions of nor in conflict with paragraph 2 of section 1 of article 8 of the constitution of Missouri, 1865; also—

That even if the said act approved March 26, 1868, had been a law reviving or re-enacting any act theretofore passed creating any private corporation, yet relator says that its charter, to wit, the said act of March 2, 1857, was not nor is within the provisions of paragraph 2 of section 1 of article 8 of the constitution of Missouri of 1865, because the said act of March 2, 1857, by which, as set forth in relator's petition herein and admitted in said respondent's return, James M. Hughes and others were, at and from the date of the approval of said act, constituted a body politic and corporate under the style of the Laclede Gas Light Company, did not prescribe any time within which said corporation should be organized or commence the transaction of its business, but, on the contrary, to wit, by section 8 of said act, expressly exempted the said Laclede Gas Light Company and the said charter thereof from the operation of sections 6 and 7 of article first of the general

53 law of the State of Missouri concerning corporations then in force, to wit, sections 6 and 7 of "An act concerning corporations," approved November 23, 1855. Wherefore relator says that from and after the approval of said act approved March 2, 1857, the said Laclede Gas Light Company, to wit, this relator, was and continued to be completely vested with all and singular the corporate rights and powers in its said charter mentioned, without any limitation as to the time of its organization or of commencing the transaction of its business, and that said charter was a contract by the State of Missouri with said corporation, in virtue whereof the said charter and the corporate powers therein granted were not subject to alteration, suspension, or repeal by any subsequent legislation on the part of said State.

Wherefore relator says that the matters averred in said portion of said respondent's return above mentioned constitute no defense to this proceeding.

Relator further demurs:

2. To that portion of said return on pages 4, 5, and 6 thereof, beginning on page 4 with the words "Respondent further shows unto the court that said act of March 26, 1868, is null and void" and ending, on line 4 of page 6, with the words "as if it were an original act or provision."

And for grounds of said demurrer relator shows the court—

That said act of March 26, 1868, was not nor by its terms purported to be an act reviving or re-enacting said act of March 2, 1857, but was and purported to be an act to amend said act of March 2, 1857, which act last mentioned was at the date of said amendatory act in full force.

54 That said amendatory act of March 26, 1868, was in no respect in conflict with the provisions of section 25 of article 4 of said constitution of Missouri, 1865, nor failed in any respect to comply with an- provision thereof concerning amendments such as therein referred to or which required the setting forth or publishing at length such amendments.

That said act of March 26, 1868, did not amend nor purport to amend said act of March 2, 1857, by providing that any designated words thereof should be struck out, or that designated words should be struck out and others inserted in lieu thereof, and was not in conflict with the provisions of said section 25 of article 4 of said constitution of Missouri of 1865 or any of them, but was a valid amendment, to wit, to the extent of and in accordance with its terms of the said act approved March 2, 1857.

Wherefore relator says that the matters averred in said portion of respondent's return last above mentioned constitute no defence to this proceeding.

Relator further demurs:

3. To the following portion of said return, contained in lines 5 to 9, inclusive, on page 6 thereof, to wit:

"Respondent further shows unto the court that the charter of the relator, by the terms of sec. 9 of the act of March 2nd, 1857, expired on the 2nd of March, 1887, and that relator therefore is not entitled to any of the privileges, rights, or franchises claimed by it"

Because the averments therein contained constitute no defence to this proceeding, for that the construction therein sought to be
55 placed by respondent upon said act of March 2, 1857, is erroneous and is not consistent with the other provisions of said act as set out in relator's petition and admitted in said respondent's return, nor with other material averments in said return contained.

Because section 6 of said act of March 2, 1857, which authorized the city of St. Louis, at the expiration of twenty years from the time of the organization of said company, to wit, this relator, under said charter to purchase all the property and effects of said company upon terms therein stated, further provided that if said city should fail so to purchase said property and effects, then said char-

ter should be, and the same was thereby, renewed and extended for the period of thirty years after the expiration thereof; and it does not appear nor is by respondent in said return alleged that the city of St. Louis has ever purchased or offered to purchase the property and effects of relator or any part thereof, as by said section 6 authorized.

Relator further shows the court—

That if the act approved March 26, 1868, amending said act of March 2, 1857, was and is null and void, as by respondent in his said return alleged, then said section 6 of said act of March 2, 1857, was not repealed thereby, but remained in force; and since it does not appear nor is averred in said respondent's return that the said city of St. Louis ever purchased or offered to purchase the property or effects of relator, the charter of said relator, to wit, the said act of March 2, 1857, and all rights and privileges thereby granted to relator were by the express provisions of said section 6 thereof renewed and extended for thirty years after the expiration of the period mentioned in section 9 of said act of March 2, 1857,
56 to wit, until March 2, 1917, and are now still in force.

But if, as relator contends, said act of March 26, 1868, was and is a valid act, in amendment of said act of March 2, 1857, then relator was and still is entitled under said act of March 2, 1857, as so amended, to exercise, have, hold, and enjoy all and singular the corporate rights, privileges, and franchises granted by its said charter as so amended.

Wherefore relator says that in any event its charter is and remains in full force, and said portion of said return last above mentioned sets forth no defence to this proceeding nor any reason why relator should not have the relief sought herein.

Relator further demurs:

4. To that portion of said return beginning with the words "and that it is provided by article 2, chap. 15, rev. ordinance of the city of St. Louis, 1887," in line 7 of page 7 of said return, and ending with the words "as is asked for by relator in this case."

And for grounds of said demurrer relator shows the court—

That by the terms of said act to incorporate the Laclede Gas Light Company, approved March 2, 1857, being the original charter of relator, as set forth in said alternative writ and admitted by said respondent's return, special reference being had to section 8 of said act, the said charter was and is a contract between the State of Missouri and said corporation, not subject to alteration, suspension, or repeal except with the consent of said corporation, and that any constitutional provision, law, or municipal ordinance adopted
57 or enacted after said date, by or by authority of said State or by any municipality thereof, inconsistent with any right, privilege, or franchise granted by said charter to relator or the effect of which would be to deny to relator any such right, privilege, or franchise, or to annex to the full exercise thereof by relator any condition or requirement not prescribed by said charter would be in contravention of section fifteen of article 2 of the constitution of Missouri, 1875, forbidding the General Assembly to pass any law

impairing the obligation of contracts, and also of section 10 of article I of the Constitution of the United States, forbidding any State to pass any such law.

That the provisions of said ordinance of said city of St. Louis in said portion of said return mentioned, if held valid or binding upon relator, would necessarily impair the obligation of the contract between relator and said State of Missouri, contained in said charter, by annexing to the exercise by relator of the rights and privileges by said charter granted to it certain conditions and requirements not prescribed by said charter and which it does not appear nor is by respondent averred that the relator has ever consented to or accepted.

Wherefore relator says that the matters averred in said portion of respondent's return last mentioned do not, nor does any of said matters, constitute any defence to this proceeding nor any reason why the relief here sought should not be granted.

HENRY HITCHCOCK,
G. A. FINKELNBURG,
ISAAC H. LIONBERGER,
Attorneys for said Relator.

38 And also files its motion to strike out parts of respondent's return, which said motion is in words and figures as follows, viz:

In the Supreme Court of Missouri, October Term, 1894.

THE STATE OF MISSOURI *ex Relatione* THE LACLEDE GAS LIGHT COMPANY, Relator,
vs.
MICHAEL J. MURPHY, Street Commissioner of the City of St. Louis, Respondent.
No. 7434.

Now comes said relator and moves the court to strike out the following portions of respondent's return to the alternative writ in this behalf, to wit:

1. That portion of said return contained in lines 10 to 21, on page 6 thereof, as follows:

"For further and separate return respondent shows unto the court that, even conceding all that relator claims with reference to the validity of the act of March 26th, 1868, and of the act of March 2nd, 1857, nevertheless relator is not entitled to the relief asked for in this case, because respondent says that it has never by any act been granted a franchise to make and vend electricity for any purpose whatever, but that whatever rights, privileges, and franchises it ever enjoyed were confined to making and vending gas, gas-lights, gas-fixtures, and any substance or material used as a substitute therefor, and that electricity, whether used for lighting or power purposes, is not a substance or material, and hence relator has not any right to make or vend the same anywhere."

59 And for grounds of said motion relator shows to the court—

That the matters averred in said portion of said return are immaterial and not responsive to the averments in relator's petition or the relief sought therein; but, on the contrary, respondent attempts thereby to tender a false and immaterial issue in respect of the rights alleged and relief sought by relator in and by its petition in this behalf:

Forasmuch as the privilege and right which relator seeks by this proceeding to enforce, as by its said petition appears, is the said right of relator, under its said charter, to establish and lay down in the streets of the city of St. Louis all pipes, fixtures, or other thing properly required in order to carry on the business of lighting the city of St. Louis and the business of making and vending gas, gas-lights, gas-fixtures, and any substance or material which at the date of said charter was or thereafter might be used as a substitute therefor, and especially the right, which relator claims under said charter, to lay down under said streets, in pipes or conduits suitable therefor, wires by means of which to transmit currents of electricity for the production of electric light as a substitute for gas-light.

Relator further shows to the court that it is a matter of common knowledge, and of which relator submits that the court will take judicial notice, that in making or producing gas-light by means of ordinary illuminating gas the carbon, which is a component part or element of such gas, is brought to a condition of incandescence by the application of heat, and it is also a matter of common
60 knowledge, of which the court will take judicial notice, that in making or producing electric light, which for years past has been and is now largely used as a substitute for gas-light, the carbon, which is used for arc lights in the form of rods or pencils and for incandescent lamps in the form of a thread or filament, is brought to a condition of incandes-cence by generating and transmitting through said carbon what is called electricity, the light or illumination produced in either case being, as is commonly known, the result of the incandescent condition of the carbon used and the effect thereof upon the organs of sight.

That, as averred in the petition of relator herein and not denied in said respondent's return, relator has for a long time past carried on the business of making and vending to the city of St. Louis under a contract with said city therefor, and to many of the inhabitants thereof, as a substitute for gas-light, what is called electric light—that is to say, light radiating from carbon rods or carbon filaments heated to incandescence by means of electricity, as above mentioned, instead of light radiating from particles of incandescent carbon in the flame of burning gas, thereby substituting one form of incandescent carbon for another form thereof, each of said forms of carbon being a substance or material within the meaning of relator's charter and within the corporate rights and powers thereby conferred on relator; and relator says that in proposing, as in its said petition set forth, to establish and lay down in the streets of St. Louis a sys-

tem of wires strung or laid in under-ground pipes or conduits as a substitute for the overhead wire strung on poles along said streets, hitherto used by it, so as by means of said under-ground wires
61 more conveniently and safely to transmit or convey to such carbon rods or filaments currents, which, as admitted by respondent's return, it is necessary to convey by means of wires strung either on poles or in under-ground conduits in order to make said carbons incandescent, thereby producing electric light as a substitute for gas-light, relator proposes to substitute for the gas pipes and fixtures, which formerly were alone used by it in carrying on the business authorized by its charter, pipes or conduits and wires such as properly required for said purpose: also are lamps and carbons used therefor, and incandescent lamps and carbon filaments which are a necessary part thereof, each and all of which pipes or conduits, wires, arc or incandescent lamps, and carbon rods or filaments respectively relator avers are substances and materials within the meaning and intent of said charter of relator.

Wherefore relator says that whether what is called electricity, by means whereof said carbon rods and filaments are rendered incandescent and caused to radiate light as aforesaid, is or is not a substance or material is an issue wholly foreign and immaterial to the questions arising upon the said alternative writ—that is to say, as to the right of relator under its charter to make and vend electric light as a substitute for gas-light and its right, for that purpose, to make use of incandescent carbon in the form of rods or filaments as a substitute for incandescent gas and to use arc and incandescent lamps with carbon rods or filaments as a substitute for gas-fixtures and, to that end, in lieu of and as a substitute for under-ground gas-pipes and gas-fixtures and apparatus connected therewith to establish and lay down in the streets of said city of St. Louis such pipes or conduits as may be properly required for the maintenance of wires for the transmission of electricity—inasmuch as relator
62 avers that the determination of that question or pretended issue would not in any manner assist or enable this court to adjudicate or pass upon any right in this behalf alleged or claimed by relator; and the said portion of said respondent's return should therefore be disregarded and stricken out as immaterial.

2. Also that portion of said respondent's return contained in lines 3 to 6, inclusive, on page 7 thereof, as follows:

"That it is provided by sec. 2721 of art. 5 of chap. 42, Rev. Stats., 1889, that no company shall place its wires and other fixtures under ground in any city unless it shall first obtain consent from said city through the municipal authorities thereof."

And for grounds thereof relator shows the court—

That the said provision alleged by respondent to be part of section 2721 of article V, chapter 42, of the Revised Statutes of Missouri, 1889, does not truly or correctly set forth the purport or intent of the statutory provision therein referred to, in this: that the provisions of said section 2721 by their terms expressly relate only to telegraph and telephone companies organized under the provisions of said article V, chapter 42, of said Revised Statutes of 1889

and do not relate nor purport to relate in any manner to any corporation except telegraph or telephone companies, nor to any such companies except such as shall have been organized under the provisions of said article V of said chapter 42 of said Revised Statutes.

Wherefore relator says that said portion last mentioned of said return is irrelevant and immaterial to any question involved in this proceeding and constitutes no defence thereto.

3. Also that portion of said respondent's return contained
63 in lines 18 to 22, inclusive, on page 8 thereof, as follows:

"Respondent shows to the court that on the 2nd of March, 1857, lighting by electricity was wholly unknown to art, and that the General Assembly of Missouri, by the act of March 2, 1857, did not and did not intend to confer upon relator the right to manufacture and vend electricity for lighting purposes."

And for grounds of said motion relator shows to the court—

That said portion of said return last mentioned is immaterial and irrelevant to the questions presented by relator's petition and the alternative writ in this behalf and constitutes no defence to said alternative writ or to the relief sought by relator in this proceeding:

Because it appears from the terms of said act of March 2, 1857, that the State of Missouri thereby, to wit, by the fifth sections of said act, expressly granted to relator the corporate right and privilege of making and vending gas, gas-lights, or gas fixtures, and any substance or material that might then or thereafter be used as a substitute therefor, without annexing to such right any condition that such substitute should be only such as was known to art at the date of the approval of said act.

4. Also that portion of respondent's return contained in lines 23 to 28, inclusive, on page 8 thereof, as follows:

Respondent further shows unto the court that it is likewise true that on the 26th of March, 1868, lighting by electricity was wholly
64 unknown to art, and that the General Assembly of Missouri did not and did not intend to confer upon relator, by the act of March 26, 1868, the right to manufacture and vend electricity for lighting purposes."

And for grounds of said motion relator shows the court—

That said portion of said return last mentioned is immaterial and irrelevant to the questions presented by relator's petition and the alternative writ in this behalf and constitutes no defence to said alternative writ or to the relief sought by relator in this proceeding:

Because it appears from the terms of said act of March 2, 1857, that the State of Missouri thereby, to wit, by the fifth section of said act, expressly granted to relator the corporate right and privilege of making and vending gas, gas-lights, or gas-fixtures, and any substance or material that might then or thereafter be used as a substitute therefor, without annexing to such right any condition that such substitute should be only such as was known to art at the date of the approval of said act.

And it further appears from the terms of said act of March 26, 1868, by which said act of March 2, 1857, was amended, as set forth in relator's petition, that all the rights, privileges, and franchises

granted to said relator by said *fifth* section of said act of March 2, 1857, were by said amendatory act of March 26, 1868, confirmed to relator without annexing to any such right, privilege, or franchise any condition that such substitute should be only such as was known to art at the date of the approval of said amendatory act.

HENRY HITCHCOCK,
G. A. FINKELNBURG,
ISAAC H. LIONBERGER,
Attorneys for said Relator.

65 And afterwards, to wit, on the 5th day of February, 1895, the following further proceedings were had in said cause, viz:

STATE *ex Rel.* LACLEDE GAS. L. Co., Rel.,)
v.
M. J. MURPHY, Resp.)

Now, at this day, it is ordered by the court that this cause be set for hearing February 19, 1895.

And afterwards, to wit, on the 19th day of February, 1895, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* LACLEDE GAS LIGHT CO., Rel.,)
v.
M. J. MURPHY, Resp.)

Now, at this day, it is ordered by the court, on its own motion, that this cause be transferred to the court in banc.

And afterwards, to wit, on the 26th day of February, 1895, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* LACLEDE GAS LIGHT CO., Rel.,)
vs.
M. J. MURPHY, Resp.)

Now, at this day, it is ordered by the court that this cause be set for hearing on March 19, 1895.

And afterwards, to wit, on the 19th day of March, 1895, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* LACLEDE GAS LIGHT CO, Rel.,)
v.
M. J. MURPHY, Resp.)

Now come the said parties, by attorneys, and, after argument herein, submit this cause to the court, and upon motion it
66 is ordered by the court that the said relator be granted 10 days in which to file additional briefs.

And afterwards, to wit, on the 18th day of June, 1895, the further following proceedings were had in said cause, viz:

STATE OF MISSOURI at the Relation of THE LACLEDE GAS LIGHT COMPANY, Relator,
vs.
MICHAEL J. MURPHY, Street Commissioner of the City of St. Louis, Respondent. } Mandamus.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court, here, being now sufficiently advised of and concerning the premises, doth consider and adjudge that the peremptory writ of mandamus prayed for herein be, and the same is hereby, denied, and that the said respondent recover against the said relator his costs and charges herein expended, and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows:

In the Supreme Court of Missouri, April Term, 1895. In Banc.

STATE *ex Rel.* THE LACLEDE GAS LIGHT COMPANY, Relator,
v.
MICHAEL J. MURPHY, Street Commissioner of St. Louis, Respondent.

67 On the petition of relator an alternative writ of mandamus was issued by this court, directed to respondent Murphy, as street commissioner of the city of St. Louis, commanding him to show cause why he should not be required to issue a permit to relator to make an excavation along the east side of Broadway, as near the curb as practicable, and extending from Mound street to Olive street, in the city of St. Louis, in so far as such excavation should be necessary for the purpose of laying relator's electric wires under ground.

By its petition relator represents that it is a corporation created under an act of the legislature of the State approved March 2nd, 1857, and a supplementary and amendatory act approved March 2nd, 1857, and a supplementary and amendatory act approved March 3d, 1857, and an amendatory act approved March 26th, 1868.

These acts are set out in full in the petition. The first, approved March 2nd, 1857, is entitled "An act to incorporate the Laclede Gas Light Company."

The first section of the act creates James M. Hughes and seven others a body politic and corporate, by the style of "The Laclede Gas Light Company, and by that name they and their successors and assigns are given perpetual succession," etc.

The second section fixed the capital stock at fifty thousand dollars and authorized it to be increased to two millions.

The third section directs that the affairs of the company shall be managed by a board of not less than five directors, etc.

The fourth section authorized books of subscription for the capital stock to be opened in St. Louis, and, upon the sum of fifty thousand dollars being subscribed, provides that the company may organize under this charter.

68 Section five provides that said company, its successors, and assigns should, within the corporate limits of said city, not embraced within the limits as established by act of 1839, "have and enjoy during the continuance of this act the sole and exclusive privilege and right of lighting the same, and of making and vending gas, gas-lights, gas-fixtures, and of any substance or material that may now or hereafter be used as a substitute therefor, and to that end may establish and lay down in said portion of said corporate limits all pipes, fixtures, or other thing properly required in order to do the same (the same to be done with as much dispatch and as little inconvenience to the public as possible), and shall also have other powers necessary to execute and carry out the privileges and powers hereby granted to said company."

Section six authorized the city of St. Louis and the company to make any contracts that they may deem to their mutual advantage in regard to the lighting of any parts of said portion of said corporate limits or any other thing relating to the business and affairs of said company. It provides that "the said city shall have the right at the expiration of twenty years from the time of the organization of said company under this charter to purchase all the property and effects of the same, paying therefor to the same the value of such property and effects, with twenty per cent. added thereto, and the manner of ascertaining the value by appraisers is provided. Said section has this further provision: "If said city so fail to purchase said property and effects, then this charter shall be, and the same is hereby, renewed and extended for the further period of thirty years after the expiration thereof."

69 Section 7 punishes any person or body corporate who interferes with the privileges granted to said company or exercises like acts or privileges by a forfeit and fine to said company of one thousand dollars for every such offense and makes each day's continuance of such offense a new offense.

Section eight exempts the company from the operation of sections 6, 7, 13, 14, 15m, 16, and 20 of art. 1 of "An act concerning corporations," approved November 23d, 1855. The sections of the act of November 23d, 1855, here referred to, are contained in chap. 34, Rev. Stats. 1855, pp. 371 to 374.

Section nine is as follows: "This act shall take effect from its passage, and shall continue in force for thirty years."

The act of March 3rd, 1857, is as follows:

"An act supplementary and amendatory of an act entitled An act to incorporate the Laclede Gas Light Company."

"Be it enacted by the General Assembly of the State of Missouri as follows:

SEC. 1. The act to which this act is amendatory is hereby amended so that the words "sole and exclusive," in the fifth section of the act are stricken out.

SEC. 2. The city of St. Louis shall not be compelled, in any purchase which it may make under the sixth section of the before-recited act, to pay more than the appraised value of the property and

effects of the corporation created by said act, without any addition of percentage.

This act to take effect and be in force from and after its passage."

The act of March 26, 1868, was entitled "An act to amend an act to incorporate the Laclede Gas Light Company," approved March 2nd, 1857, and is as follows:

70 SECTION 1. The Laclede Gas Light Company shall and may, within the corporate limits of the city of St. Louis, as the same are now or may hereafter be established, exercise, have, hold and enjoy forever, all the rights, privileges, and franchises granted to it by the fifth section of the act to which this act is amendatory, and may at any time lease, sell or dispose of any portion of said rights, privileges and franchises to individuals, associations or corporations, intending or desiring to exercise the same within any portion of the limits aforesaid.

SEC. 2. The capital stock of said company may be increased from time to time to such amount as may be necessary to carry on its business.

SEC. 3. Nothing in this act contained shall be construed as affecting the vested rights of the St. Louis Gaslight Company, and the sixth section of said act, to which this act is amendatory, is hereby repealed.

SEC. 4. An act entitled An act supplementary to and amendatory of an act entitled An act to incorporate the Laclede Gaslight Company, approved March 3, 1857, is hereby repealed.

SEC. 5. This act shall take effect from its passage.

Relator represents further that under the charter rights granted by these general acts it is and for a long time has been engaged in the lighting business, both by gas and electricity; that under a contract with the city of St. Louis it is lighting a part of its public streets by electricity; that it is furnishing light by means of gas or electricity to many thousand private consumers in said city, being a large part of the inhabitants thereof; that in order to fulfill its obligations to the city and the public under its charter

71 it has erected and maintains extensive and costly plants for the manufacture and distribution of gas as well as for generating and distributing electric currents; that for distributing gas it has from time to time constructed and maintained and now maintains a system of pipes laid under ground along the streets of the city of St. Louis, as it was at all times authorized to do by its charter, nor has the city of St. Louis ever objected to its so doing or disputed relator's right to do so; that for the distribution of electricity relator has hitherto used overhead wires, strung upon poles along the streets and alleys of said city, which poles and electric wires have been and are maintained and used by relator without objection by said city or the authorities thereof for the distribution of electricity as well *as* to furnish light to private consumers as for the fulfillment by relator of its said contract with said city of St. Louis for the lighting by electricity of certain public streets and alleys thereof; that to effect such distribution it is necessary to transmit through and by means of said wires electric currents of great power,

which if and when accidentally diverted are dangerous to human life and property; that in order to avoid the increasing inconvenience and danger to the public necessarily incident to that method of distributing electric currents, and in order to provide more effective and proper service, relator has made arrangements to lay its wires under ground along and under the streets of said city, according to approved and practicable plans, and is now ready to do so with as much dispatch and as little inconvenience to the public as possible.

Relator states further that respondent was street commis-
72 sioner of said city, and under its charter and ordinances had supervision and control of its streets and the enforcement of ordinances relating thereto. That after notice to said commissioner of its intention to do so on the 30th day of October, 1894, the relator commenced excavating on said streets for the purpose of laying its electric wires under ground, but was prevented from so doing by respondent, acting in his capacity of street commissioner; that thereupon relator applied to respondent for a permit to make such excavation for such purposes, which was denied him.

Respondent made return to said writ and by affirmative averments put in issue the rights claimed by relator, and set up the provisions of certain city ordinances regulating the use of electric wires on the streets of the city and averred a non-compliance with the requirements of such ordinances. By demurrer to parts of the return and motion to strike out other parts the following issues of law were fairly framed:

First. Is the act of March 26th, 1868, unconstitutional as being in conflict with section 2, article 8, of the constitution of Missouri of 1865?

Second. Is said act void as being in conflict with section 25 of article 4 of said constitution?

Third. Did the charter of relator expire by limitation at the end of thirty years from the date of the act of March 2nd, 1857?

Fourth. Do the powers granted relator include the right to manufacture, sell, or distribute electricity for lighting purposes?

Fifth. Has relator the right, under its charter, to place its wires under ground without the assent of the municipal authorities
73 and without compliance with the requirements of the valid ordinances of the city?

I. The object to be accomplished by the writ is to require Murphy, as street commissioner of the city of St. Louis, to issue to relator a permit to make such excavations on one of the public streets of the city as may be necessary for the purpose of laying its electric wires under ground. The constitutionality of the acts under which relator claims corporate *exists* is put in issue by the answer of respondent and demurrer thereto. Respondent also charges that, though the acts of incorporation itself were valid, in the first instance, the life of the corporation has expired by limitation of its existence as fixed by the charter and general laws of the State.

The city is not made a party to this proceeding, and we do not deem it necessary in this case to pass upon any questions that do

not directly concern the duties of the street commissioner. We will not, therefore, consider or express an opinion upon any question involving the right of relator to exercise the rights or enjoy the franchises which appear to have been granted under the acts of the General Assembly mentioned in the statement.

For the purpose of discussing the other questions involved, we will then assume, without deciding or intimating an opinion, that relator is an existing corporation possessi*on* all the powers, rights, and privileges its charter purports to confer upon it.

It is insisted by relator that under its charter it acquired from the State a vested right to the use of the streets *of the streets*
74 of the city of St. Louis under which to lay its pipes for the transmission of gas or any other "substance or material" that might thereafter be adopted for illuminating purposes, and that such right was beyond the control of the municipal authorities; that electricity is a substance and material within the meaning of the charter, and therefore it has a vested right to lay its wires beneath the surface of the streets for the purpose of conducting electricity through the city for illuminating purposes, and that this right cannot be interfer*e*d with unreasonably by the city.

With the views we take of this question we do not think it necessary to inquire whether the right to use electricity for making light was included under the terms "substance or material" as used in the charter. It appears that relator has for a number of years, under contracts with the city, been lighting its streets by electricity conducted by wires strung above the surface of the streets, and other questions besides the abstract right to do so would be involved in such inquiry. We will therefore confine our inquiry to the question whether relator has a vested right to place its electric wires under the surface of the streets without the assent of the municipal authorities thereof and without compliance with valid ordinances of the city.

Generally speaking, it is true the legislature has supreme control of the streets of cities. It is also true that it may and generally does delegate to municipal corporations such measure thereof as it deems best. The control thus delegated may be exercised by the municipal authorities.

Subsequent to the act of 1868, under authority of the constitution of 1875, the city of St. Louis adopted a charter whereby the State delegated to it the power to regulate the use of its streets and
75 the power to pass all ordinances not inconsistent with the provisions of the charter or the laws of the State as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures.

In pursuances of these powers the city enacted certain ordinances regulating and restricting the use of electric wires in the city and requiring the assent of the board of public improvement in respect to the manner in which electric wires, tubes, and cables should be secured or supported and insulated. It is charged in the return and admitted by the demurrer that relator had never complied with the requirement of this ordinance. Relator insists that the provis-

ions of the ordinance cannot apply to rights secured to it by the State long prior to the date of the charter.

It is the well-settled present policy of the law of this State to delegate to municipal corporations not only general police powers, but the control of their streets in respect to the use thereof for public purposes other than that of ordinary travel by pedestrians and private vehicles. Thus the constitution prohibits the legislature from granting the right to construct and operate street railways within any town or village without first acquiring the consent of the local authorities having control of the streets. Sec. 20, art. 12, const. of Mo.

Again, the statute requires telegraph and telephone companies to obtain the consent of the city, through its municipal authorities, before they can exercise the right to lay their wires and other fixtures under ground in any of its streets. R. S. 1889, sec. 2721.

76 Electric wires when charged are recognized as being dangerous to life and property, and their use is therefore subject to police regulations. W. U. Telegraph Co. *v.* Philadelphia, 21 Am. & Eng. Corp. Cas., 40 & note; Dill. Munic. Corp., sec. 698.

The State cannot limit its exercise of the police power by contract or in any other way. It was said by Chief Justice Waite: "All agree that the legislature cannot bargain away the police power of the State. Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police." Stone *v.* Mississippi, 101 U. S., 817. See Boyd *v.* Alabama, 94 U. S., 645; Metropolitan Bd. *v.* Barrie, 34 N. Y., 657; Railroad *v.* Mayor of Balt., 77 Md., 381.

Dillon says, "The citizen owns his property absolutely, it is true; it cannot be taken from him for any private use whatever without his consent nor can it be taken for any public use without compensation; still he owns it subject to this restriction, namely, that it must be so used as not to unreasonably injure others, and that the sovereign authority may by police regulations so direct the use of it that it shall not prove pernicious to his neighbors or the citizens generally." Dill. Munic. Corp.

The grant by the State to relator, though construed to include the right to use electricity for illuminating purposes, in respect to such right, was taken subject to reasonable regulations as to its use, and the power to regulate has been delegated to the city of St. Louis.

77 Under its general police power the city has the right to require compliance with reasonable regulations as a condition to using its streets by electric wires.

II. But this is not the only reason why the city should not, under its special power to regulate the use of its streets and under its general police power, have the right to supervise and regulate the manner in which electric wires of relator and all others should be placed and used in the public streets.

The art of producing light by electricity was wholly unknown to

science at the time the franchise was granted to relator. The legislature, having no knowledge of the use that would be made of streets in applying new discoveries in producing light, could not have intended to grant rights and powers inconsistent with their ordinary use. It would be most unwarrantable to imply, not only that relator had the right, under the general words used in the act of incorporation, to use electricity for lighting purposes, but that it also had the right to *use electricity for lighting purposes, but that it also had the right to* adopt its own methods for exercising that power regardless of the paramount rights of the public to the use of the streets.

The powers delegated to the city to regulate the use of its streets existed before the art of lighting by electricity was known, or, at least, before relator adopted it, and the art should be exercised, if at all, under the powers thus in force when it was brought into use.

The following declaration of law was quoted approvingly in Carroll *v.* Campbell (108 Mo., 559): "It is a well-settled rule of construction of grants by the legislature to corporations, whether
78 public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the object of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public." Fanning *v.* Gregoire, 16 How., 534.

There seems to me much stronger reason for applying this rule to the manner in which a right conferred shall be exercised when more than one method is open and when the rights and safety of the public are more or less affected by either. In such case where the public streets of a city which are under municipal control are to be used it seems too plain for argument that the city should have the right to direct the manner in which the use should be exercised.

Again, it is a matter of common knowledge that electricity is used for the purpose of transmitting sound by telephone, for transmitting messages by telegraph, for generating light, and for producing power. These uses are regarded as public and have become necessary to the business and convenience of the country, and particularly that transacted in the large cities. Overhead electric wires in some streets are numerous. These contribute very materially to public convenience and private business, but when not properly supervised and regulated endanger the lives and property of the public. If used, as they generally are, in the public streets, public safety requires that they should be under police regulation and municipal control.

It is a matter also of public notoriety that the question is now being considered whether it would not be necessary, in the
79 interest of public safety as well as convenience, that these wires should be placed under ground, so as thereby to leave the streets safe and unobstructed.

As a police regulation, we have no doubt the municipal authorities would have the right to require this to be done in case no

vested rights were infringed. Many corporations and companies, doubtless, now use electric wires for the various purposes above mentioned. It cannot be said, not having the various charters before us, that one of these possesses rights superior to those of any others. To accommodate them all, to prevent monopolies, and to regulate the use of the streets it seems absolutely necessary that the municipal authorities should have the right to direct the manner in which wire shall be placed under ground. Without such regulation relator or any other corporation using electric wires could place them under ground in such a manner as to practically exclude all others. Moreover, relator, as one of its important franchises, asserts the power to sell, lease, or dispose of any portion of said rights, privileges, and franchises to individuals, associations, or corporations intending or desiring to exercise the same within any portion of the limits named. Thus, under this charter allowing the rights herein claimed it could practically control the use of the streets in respect to laying electric wires under ground and exclude the city from one of the most important of its municipal powers. The legislature could never have contemplated such a result.

By giving the city the right to regulate the laying of electric wires under ground relator is deprived of no vested right. If its
80 charter gives it the right to use electricity for lighting purposes it can do so, as we understand from the petition it has been doing in the method now in use in said city. If the city should determine that public safety requires these wires to be placed under ground and provides the manner in which it shall be done and relator believes its rights are thereby infringed, it will then be time enough to complain.

As the case is now presented we must hold that the city, under its power to regulate the use of streets and under its general police power, has the right to require a compliance with regulations which neither wholly prohibit relator from laying its wires under the streets or which regulate the manner in which it may be done.

Respondent, under his official duties as street commissioner, properly refused to grant the permit demanded unless relator first complied with the requirements of the valid ordinances then in force.

Peremptory writ denied. All the judges concur. Barclay, J., in the result.

G. B. MACFARLANE, *Judge.*

And afterwards, to wit, on the 21st day of June, 1895, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* LACLEDE GAS LIGHT CO., Rel.,)
v.)
M. J. MURPHY, Resp.)

Comes now the said relator, by attorney, and files its motion to modify the judgment herein.

Which said motion is in words and figures as follows, to wit:

81 In the Supreme Court of Missouri, April Term, 1895.

STATE OF MISSOURI at the Relation of THE LACLEDE GAS LIGHT COMPANY, Relator,
vs.
MICHAEL J. MURPHY, Street Commissioner of the City of St. Louis, Respondent.

No. 7434. Court in Banc.

Now comes relator and moves the court to modify the judgment heretofore entered in this cause, to wit, on the 18th day of June, 1895, so as to allow relator to plead to or traverse respondent's return in accordance with the usual practice in cases of mandamus and as provided by the statutes of Missouri applicable thereto.

And for grounds of this motion relator says that the argument and decision were upon a demurrer to parts of the return and a motion to strike out other parts thereof; that the effect of the decision rendered by this court on the 18th day of June, 1895, is to overrule the demurrer as well as the motion and to leave to relator the alternative right of letting judgment go upon the pleadings as they stand or to plead over; but relator desires to plead over before a final judgment is entered, for the reason that relator wishes to set out in full the city ordinances referred to in respondent's return, which have not been set out in the pleadings as they now stand, and also for the reason that by the demurrer relator constructively admits certain allegations of fact which it desires to deny, so that if relator should determine to sue out a writ of error from the United States Supreme Court it may have the benefit of a

82 complete and proper record in the cause.

Because, reference being had to the state of the pleadings in said cause and to the statute in such case provided, relator respectfully suggests to the court that the said final judgment rendered on the 18th day of June was prematurely and improvidently rendered.

THE LACLEDE GAS LIGHT COMPANY, *Relator*,
By HENRY HITCHCOCK,
G. A. FINKELNBURG,
I. H. LIONBERGER,
Its Attorneys.

Received at St. Louis, Missouri, this 21st day of June, 1895, a copy of the above motion, with notice from said relator that said motion will be called up and submitted to said supreme court at nine o'clock in the forenoon of Tuesday, June 25, 1895, or as soon thereafter as counsel can be heard; which notice is hereby accepted.

W. C. MARSHALL,
Attorney for M. J. Murphy, Respondent.

And afterwards, to wit, on the 25th day of June, 1895, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* LACLEDE GAS LIGHT CO., Relator,
vs.
M. J. MURPHY, Street Commissioner, etc., Respondent.

Now, at this day, the court, having fully considered and
83 understood the motion heretofore filed to modify the judgment heretofore entered herein and to allow the relator to plead to the return herein, doth ordered that the judgment entered herein on the 18th day of June, 1895, be, and the same is hereby, set aside; that the demurrer to the return and motions to strike out parts thereof are overruled, and that leave is granted relator to plead to the return within five days from June 25, 1895, and this cause is continued.

And afterwards, to wit, on the 28th day of June, 1895, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* LACLEDE GAS LIGHT CO., Relator,
vs.
M. J. MURPHY, Respondent.

Now, at this day, comes the said relator, by attorney, and files its traverse to the respondent's return herein.

Which said traverse is in words and figures as follows, to wit:

In the Supreme Court of Missouri, April Term, 1895.

STATE *ex Rel.* LACLEDE GAS LIGHT COMPANY, Relator,
vs.
M. J. MURPHY, Street Commissioner, Respondent. — No. 7434.

Now comes said relator, by its attorneys of record, and, by
84 leave of court first obtained therefor, for its plea to the return of said respondent in the above-entitled cause says—

That it, said relator, is advised, and therefore avers, that the said act approved March 26, 1868, is not unconstitutional, null, or void and is not in conflict with any provision contained in article VIII of the constitution of Missouri, 1865.

Relator avers that said act of March 26, 1868, was and is a valid amendment of the act approved March 2, 1857, mentioned in said respondent's return, by which relator was incorporated, and in virtue of its said charter as amended by said act of March 26, 1868, relator is vested with and entitled to hold and enjoy all the corporate franchises, rights, and powers thereby granted.

Relator further shows the court that by section 8 of said act of March 2, 1857, it was provided that the said Laclede Gas Light Company and the said act incorporating the same were and should be exempted from the operation of sections (6) six, (7) seven, (13) thirteen, (14) fourteen, (15) fifteen, (18) eighteen, and (20) twenty of article I of the act entitled "An act concerning corporations," approved November 23, 1855.

Relator states that section 6 of said act of November 23, 1855, was in the words and figures following, to wit:

"SECTION 6. If any corporation hereafter created by the legislature shall not organize and commence the transaction of its business within one year from the date of its incorporation its corporate powers shall cease."

And section 7 of said act of November 23, 1855, was in the words and figures following, to wit:

"SECTION 7. The charter of every corporation that shall hereafter be granted by the legislature shall be subject to sus-
85 pension, alteration and repeal in the discretion of the legislature."

Relator is advised and avers that being so exempted, to wit, by section 8 of said act of March 2, 1857, from the operation of said section 6 of said act of November 23, 1855, said corporation was not required to organize nor to commence business within one year from the date of its incorporation, nor was any time prescribed in its said charter, to wit, said act of March 2, 1857, or in said amendatory act of March 26, 1868, for such organization and commencement of business; and relator further shows the court that by reason of the provision in section 8 of said act of March 2, 1857, also exempting said corporation from the operation of said section 7 of said act of November 23, 1855, relator's said charter became and was a contract between the State of Missouri and the said corporation, which was not nor is subject to alteration, suspension, or repeal by said State of Missouri or by any legislative act or provision of the constitution thereof subsequently adopted except with the consent of said corporation, and that in virtue of the provisions contained in its said charter, to wit, said act of March 2, 1857, and especially in sections 1 and 4 thereof, the corporators and stockholders of said corporation had the right under said charter to organize said corporation and to commence the transaction of its business at any time after the said act of March 2, 1857, took effect, without reference to the provisions of said act of November 23, 1855, and without reference to any act of the General Assembly or any provision of the constitution of said State which might thereafter be enacted or adopted.

86 Relator further avers that prior to the passage of said act of March 2, 1857, the St. Louis Gas Light Company was incorporated by an act of the General Assembly of the State of Missouri, approved February 4, 1837, entitled "An act to incorporate the St. Louis Gas Light Company," and that said act was amended by an act of the General Assembly, approved February 11, 1839, entitled "An act to amend the charter of the St. Louis Gas Light Company."

That by the charter of said St. Louis Gas Light Company as amended said company had the sole and exclusive privilege and right of vending gas-lights in the city of St. Louis and its suburbs for a period of twenty-five years from and after the first day of January, 1840, and in the event that the city of St. Louis did not resolve to purchase its property for a further period of twenty-five years or until the first of January, 1890.

That on said 2nd day of March, 1857, and for many years thereafter and until the year 1873 said charter of the St. Louis Gas Light

Company was in full force and effect, and relator was thereby precluded from selling gas and gas-light in said city without the consent of said St. Louis Gas Light Company, which consent was not obtained until the year 1873, and therefore relator did not begin to manufacture and sell gas until said year 1873.

Wherefore relator says that the several averments in said respondent's return contained in respect of the time when, as alleged, it, said relator, organized as a corporation and in respect of the time when it commenced the transaction of business constitute no defence to this proceeding.

87 Relator denies that it, said relator, did not organize as a corporation within one year from the time when said act of March 2, 1857, took effect. On the contrary relator avers that within one year from the time said act of March 2, 1857, took effect and during the year 1857 the persons named as corporators in said act held a meeting in the city of St. Louis, Missouri, for the purpose of accepting said charter and organizing said company under said act; that all the corporators named in said act were present at said meeting, and the said corporators then and there, to wit, in said city of St. Louis, did accept said charter and open books for subscriptions to the capital stock of said company and the sum of ($50,000) fifty thousand dollars was then and there, to wit, by said corporators and others, subscribed for the stock of said corporation, being the entire amount of the capital stock of said corporation authorized by said act, and the said subscribers and stockholders did thereupon, to wit, at said meeting, organize said company by electing five directors of said corporation from among said stockholders thereof; also electing a president and secretary of said corporation from among said directors; and relator denies that the said corporation did not commence business until the year 1873, and, on the contrary, avers that it commenced business long before the year 1873.

Relator further avers that said act of March 26, 1868, is not null or void nor is in conflict with any provision contained in article IV, section 25, of the constitution of Missouri 1865, as in said return alleged; that said act of March 26, 1868, is not an act reviving an act of March 2, 1857, nor is an act re-enacting said act of

88 March 2, 1857, nor does said act of March 26, 1868, revive or re-enact or purport to revive or re-enact said act of March 2, 1857, by mere reference to the title thereof, nor does said act of March 26, 1868, amend or purport to amend said act of March 2, 1857, by providing that designated words thereof shall be struck out or that designated words shall be struck out and others inserted in lieu thereof.

Wherefore relator says that the several averments in said respondent's return setting forth the grounds upon which, as alleged, the said act of March 26, 1868, violates section 25 of article IV of the constitution of Missouri 1865, and is therefore null and void are and each of them is immaterial and irrelevant and constitute no defence to this proceeding, and denies each and every one thereof.

Relator denies that by the terms of section 9 of the said act of March 2, 1857, the charter of relator expired on the 2nd of March,

1887, as in said return alleged; and relator avers that although, as hereinbefore stated, the said Laclede Gas Light Company was duly organized as a corporation in and during the year 1857 in pursuance of the provisions of said act of March 2, 1857, the said city of St. Louis did not at the expiration of twenty years from the time of the organization of said company nor at any time purchase or offer to purchase the property and effects of said company or any part thereof.

Relator is advised and avers that even if the averment in respondent's return, to wit, that electricity is not a substance or material, were true, which relator denies, said averment is irrelevant and immaterial and constitutes no defence to this proceeding, and further shows to the court—

89 That the object for which relator was incorporated, as set forth in said act of March 2, 1857, and referred to in said act of March 26, 1868, amendatory thereof, was to carry on the business of lighting the city of St. Louis, as well the public streets and alleys of said city as the private and public buildings thereof; that by said charter was granted to relator the right and privilege of lighting the said city and of making and vending gas, gas-lights, gas-fixtures, and any substance or material that might at the date of said charter, to wit, on March 2, 1857, or at any time thereafter, be used as a substitute therefor, and to that end relator was expressly empowered to establish and lay down in any part of the corporate limits of said city as then or thereafter established all pipes, fixtures, or other thing properly required to do the same; the same to be done with as much dispatch and as little inconvenience to the public as possible.

That for the purpose of lighting a city or to illuminate any space therein, whether a public street or alley or a building or any portion thereof, it is necessary to produce artificial light in the space to be illuminated; that artificial light is produced by making incandescent—that is to say, by bringing to a condition of white heat, in which it gives out light—any substance or material capable of being so used; that in order to light said city as aforesaid relator was expressly authorized by its charter to make and vend not only illuminating gas, but any substance or material which might then or thereafter be used as a substitute therefor, and to that end to establish and lay down at any point within the corporate lim-

90 its of said city all pipes, fixtures, or other thing properly required to do the same; that illuminating gas is a highly inflammable compound of carbon and hydrogen, chemically combined in certain fixed proportions; that in order to use said gas for illuminating purposes it must be set on fire, which decomposes said gas, setting free the carbon therein in the form of fine particles and rendering said carbon particles incandescent, which produces what is called gas-light.

That light may also be produced from carbon by means of electricity, to wit, by using carbon not compounded with any other element, in the form of rods or filaments, which may be and are brought to a condition of incandescence by transmitting into or

through said carbon rods or filaments what is called electricity by means of apparatus suitable therefor, the result being that the carbon thus rendered incandescent gives out what is called electric light, which has greater illuminating power than gas-light and is commonly used as a substitute therefor, as well for the illumination of public streets and places as of public and private buildings, in many cities throughout the United States.

That the right and privilege of lighting the city of St. Louis aforesaid granted by its charter to relator includes the production of light in the manner last above described, to wit, by making carbon or any other suitable substance incandescent by means of electricity, equally with the right or privilege of making and using carbon in its compound form of illuminating gas and by making it incandescent in the manner above stated, to wit, by the application of heat, carbon being in either case the substance or
91 material which is made incandescent, thereby producing light, though when illuminating gas is used the carbon is in a compound form, the particles thereof being set free and made incandescent by heat, as above stated, producing what is called gas-light, while in the production of electric light pure carbon is used as a substitute for gas and is made incandescent by the application of electricity.

It is true, as in said return alleged, that relator, therein exercising its corporate franchise of lighting the city of St. Louis and of vending gas and gas-light, has heretofore established, placed, and laid down certain pipes and fixtures beneath the surface of the street on the east side of Broadway from Mound street to Olive street and at divers and sundry other places beneath the surface of the streets of said city of St. Louis for supplying gas to its consumers and by means thereof relator has during more than (10) ten years last past carried on and still carries on its business as a lighting company, of all which said city and the municipal authorities thereof had notice and have at all times acquiesced therein.

It is also true that, in order to produce or furnish light by means of electricity, it is necessary to use wires for conducting the same and to support said wires either on poles above the surface of the streets, as relator is now doing under a contract with said city of St. Louis, or in tubes or conduits beneath said surface. Relator states that its purpose in making the excavation on Broadway mentioned in said petition was to construct and place under ground a conduit for wires, such conduit and wires being properly required for the
92 production of electric light as a substitute for gas-light; that the conduit and wires intended by relator to be so laid down are of the most approved description, such as are used for like purposes in other cities, said conduits occupying, when completed, a space not exceeding thirty inches in width under the surface of the street, with provision for access thereto at suitable intervals through manholes, properly covered and protected, less than forty inches in width at the surface of the street, the said conduits and manholes, when completed and in use, offering no obstruction whatever to the use of the streets for travel and traffic, and the danger to life and

property which attends the use of overhead electric wires, such as relator is now using under contract with said city of St. Louis for the purpose of lighting public streets and alleys therein, being entirely avoided by placing said wires in said conduits.

Relator denies that it has never acquired from the State of Missouri any right to place such wires above or beneath the streets of the city of St. Louis. Relator also denies that it is provided by section 2721 of article V, chapter 42, Revised Statutes of Missouri 1889, that no company shall place its wires or other fixtures under ground in any city unless it shall first obtain the consent of said city through the municipal authorities thereof. Even if the provisions of said article V of chapter 42 of the Revised Statutes of Missouri 1889 or of said section 2721, referred to by respondent, purported to relate or apply to this relator such provisions would be invalid as impairing the obligation of the contract contained in relator's
93 charter; but relator states that said article V of chapter 42 of the Revised Statutes of 1889 is a part of the general corporation law of this State, and that said section 2721 in terms applies exclusively to companies organized under the provisions of said article V for the purpose of constructing and maintaining telephone or magnetic telegraph lines and to no other corporations or class of corporations.

Relator admits that by article two, chapter fifteen, Revised Ordinances of the City of St. Louis 1887, as amended by ordinance No. 16894, the municipal authorities of said city of St. Louis undertook to prescribe certain conditions for placing wires, tubes, or cables conveying electricity along, across, or under the streets and alleys of said city, but states that the provisions of said ordinance are not fully set forth in respondent's return.

Relator states that the ordinance of the city of St. Louis last above mentioned and in said return referred to as article 2, chapter 15, Revised Ordinance of the City of St. Louis 1887, as the same has been amended by ordinance No. 16894, are the same ordinances which were revised and re-enacted by and are contained in article II of chapter 15 of the Revised Ordinance of said city of St. Louis 1892, to wit, ordinance No. 17188, entitled "An ordinance in revision of the ordinances of the city of St. Louis and to establish new ordinance provisions for the government of said city," approved April 7, 1893, said article two, chapter fifteen, being sections 603 to 614, both inclusive, of said revised ordinance No. 17188; that by said revised ordinance No. 17188 the municipal assembly of the city of St. Louis intended to and did revise and re-enact all
94 ordinances of said city then previously existing in pursuance of section 29 of article III of the charter of said city, and that from and after the 17th day of April, 1893, the said sections 603 to 614 of said revised ordinance No. 17188 were and are the only provisions of any existing ordinance of said city which purported to prescribe any regulations or conditions in respect of the placing by any person or corporation along, across, or under any of the streets, alleys, or public places in said city of any wires, tubes, or cables conveying electricity for the production of light, heat, or power, and

that the said sections 603 to 614, inclusive, of said revised ordinance No. 17188 are the ordinance provisions of said city of St. Louis which are averred in said respondent's return to be legal and binding and valid provisions and to be such as the city of St. Louis had the right to adopt and enact under the charter thereof.

Relator states and shows to the court that the said article II, chapter 15, Revised Ordinance of the City of St. Louis 1887, as the same was amended by ordinance No. 16894 and as now contained in article II, chapter 15 of the Revised Ordinance 1893, as sections 603 to 614, thereof, both inclusive, are in the words and figures following:

Article II.—Of electric wires, tubes, and cables.

SEC. 603. Conditions of placing wires, etc.—That no wires, tubes or cables conveying electricity for the production of light, heat or power shall hereafter be placed along or across any of the streets, alleys or public places in the city of St. Louis, by any person, corporation or association not having previous to the passage of this ordinance, accepted and complied with ordinance number twelve thousand seven hundred twenty-three, now amended, or shall
95 be duly authorized by the municipal assembly, and then only as hereinafter provided. (Revised Ordinance 1887, sec. 581, amended.)

SEC. 604. Wires to be placed as prescribed by board.—All such wires, tubes or cables, along or across any of the streets, alleys or public places of the city of St. Louis shall be placed at such distances above or below the surface of the ground, and secured in such manner as shall be prescribed by the board of public improvements. (Revised Ordinance 1887, sec. 582.)

SEC. 605. Application and plat to be filed.—That any person or persons, corporation or association, duly authorized by ordinance to do business in the city of St. Louis and desiring to place along or across any of the streets, alleys or public places of the city of St. Louis, such wires, tubes or cables, shall file in the office of the board of public improvements an application therefor, stating in detail the streets, alleys or public places which said wires, tubes or cables are to occupy, and the manner in which said wires, tubes or cables are to be secured or supported and insulated, together with a plat showing the route of such wires, tubes or cables. (Revised Ordinance 1887, sec. 583.)

SEC. 606. Permit may be granted.—The board of public improvements is hereby authorized, upon the filing of the application and plat required by the preceding section, to grant a permit for such occupancy of the streets, alleys and public places herein named, with such restrictions, regulations and qualifications as may be prescribed by said board and under the supervision and to the satisfaction of the supervisor of city lighting. (Revised Ordinance 1887, sec. 584, amended.)

96 SEC. 607. Wires, etc., may be placed on telegraph poles, etc., when.—That in case any person or persons, corporation or association, duly authorized by ordinance, desiring to place along

or across any of the streets, alleys or public places of the city of St. Louis, such wires, tubes or cables, shall with the application and plat heretofore provided for, file in the office of the board of public improvements the written consent of any telegraph or telephone company, or any other electric light or power company, doing business in the city of St. Louis, to the placing of such wires, tubes or cables upon the poles of said telegraph, telephone, electric light or power company, situated in the streets, alleys or public placed named in such application, the board of public improvements is hereby authorized to grant a permit for such occupancy of the poles of such telegraph, telephone, electric light or power company, with such restrictions, regulations and qualifications as may be prescribed by said board, and under the supervision and to the satisfaction of the supervisor of city lighting. (Revised Ordinance 1887, sec. 585, amended.)

Sec. 608. Poles to be placed in alleys, when.—That whenever an alley is available for the placing of poles, for the support of such wires, tubes or cables, the board of public improvements will advertise for five days previous to a day set for hearing objections or arguments in favor of placing the said poles in the alley. If, after due consideration, the board of public improvements are of the opinion that the placing of poles for the purposes aforesaid is practicable, such poles shall be placed along said alley instead of along the street named in application. Where the poles are set in any alley they shall be located as near the side lines of the alley
97 as practicable, and in such a manner as not to incommode the public or the adjoining proprietors or residents. (Revised Ordinance 1887, sec. 586, amended.)

Sec. 609. Dimensions, construction and location of poles.—The poles used as herein provided shall be of sound timber, not less than five inches in diameter, at the upper end, straight, shapely and of uniform size, neatly planed or shaved, and thoroughly painted with two coats of lead and oil paint, of such color as may be directed by the board of public improvements, and be supplied with iron steps, commencing twelve feet from the surface of the ground and reaching to the arms supporting the wires, tubes or cables; said wires, tubes or cables shall be run at a height not less than twenty-five feet above the grade of the street. Whenever the poles are erected on a street they shall be placed, in all cases, when practicable, on the outer edge of the sidewalk, just inside the curbstone and on the line dividing the lots one from the other, and in no case be so placed as to obstruct the drainage of the streets, or interfere with or damage in any way the curbstones, trees or other public or private property on the line of the street or alley or public place where such pole shall be erected. (Revised Ordinance 1887, sec. 587.)

Sec. 610. Streets and alleys to be replaced.—Any person or persons, corporation or association having made excavations in the streets, alleys or public places of the city of St. Louis for the purposes aforesaid, shall replace the streets, alleys or public places in such manner and in accordance with such regulations as may from time to time be prescribed by ordinance, or by the board of public

improvements, and to the satisfaction of the street commis-
98 sioners. (Revised Ordinance 1887, sec. 588.)

SEC. 611. Alterations in location of poles, etc., may be ordered.—The right is hereby reserved to the board of public improvements at any time to direct any alterations in the location of said poles, and also in the height at which the wires, tubes or cables shall run; but before any alteration is made, at least five days' notice in writing shall be given to the person or persons, or the president or the officer in charge of the company affected by the proposed alteration, and reasonable opportunity shall be afforded the representative of such company, or any citizen interested, to be heard in regard thereto. But when any such alteration shall be ordered, the said company shall within five days thereafter commence such alterations and complete the same as soon as practicable thereafter; and upon failure so to do, it shall be deemed guilty of a misdemeanor, and punished as hereafter provided. (Revised Ordinance 1887, sec. 589.)

SEC. 612. Privileges conferred, on what conditions.—No person or persons corporation or association, shall be entitled to any of the privileges conferred by this article, except upon the following conditions: That said person or persons, corporation or association, before availing himself or itself of any of the rights or privileges granted by this article, shall file with the city register his or its acceptance of all the terms of this article, and agree therein that he or it will file with the comptroller of the city, on the first days of January and July of each year, a statement of his or its gross receipts from his or its business arising from supplying electricity for light or power for
the six months next preceding such statement, which shall be
99 sworn to by such person or persons, or the president or secretary of such corporation or association; and further agree that he or it will, at the time of filing such statement with the comptroller, pay into the city treasurer two and one-half per cent. on the amount of such gross receipts up to the year eighteen hundred and ninety, and five per cent. on the amount of gross receipts thereafter. And said person or persons, or corporation or association, shall, at the time of filing said acceptance, also file with the city register his or its penal bond in the sum of twenty thousand dollars with two or more good and sufficient securities, to be approved by the mayor and council, conditioned that he or it will comply with all the conditions of this article, or any ordinance which may be hereafter passed, regulating the placing of wires, tubes, or cables in the streets and alleys for the purposes named therein; that he or it will comply with all the regulations made by the board of public improvements having reference to the subject embraced in this article or any ordinance herein named; that he or it will make the statements and payments required by the provisions of this section, and will save the city of St. Louis harmless and indemnified from all loss, cost, or damage by reason of the exercise of any of the privileges granted by this article or any ordinance which may be hereafter passed relating to the subject-matter of this article. (Revised Ordinance 1887, sec. 590.)

SEC. 613. Penalty.—Any person or persons, corporation or association which, or any president, manager, superintendent or officer in charge of any corporation or association who shall violate or fail to comply with any of the provisions of this article, shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined not less than fifty dollars, nor more than five hundred dollars.
100 (Revised Ordinance 1887, sec. 591.)

SEC. 614. Reservation of rights.—The city reserves the right to alter, amend or repeal this article at any time. (Revised Ordinance, sec. 592.)

It is true that relator did not previous to the passage of said ordinance No. 16894 accept the provisions of said article II, chapter 15, Revised Ordinance 1887, and that it has never accepted the provisions of said ordinance No. 16894, and that it, said relator, has not been authorized by ordinance of the municipal assembly of the city of St. Louis to place its wires, tubes, or cables under the streets or alleys of said city.

Relator denies that the requirements of said city ordinances set forth were or are legal and binding and valid provisions so far as the rights of this relator under its charter were or are concerned, and denies that as against this relator said city of St. Louis had or has the lawful right or power to adopt or enforce the same, whether under the provisions of paragraph 2 of section 26 of article III of the charter of said city, as by respondent alleged, or under any other provision of the charter of said city.

Relator further shows to the court that by reason of the exemptions contained as aforesaid in section 8 of said act of March 2, 1857, relator's charter as granted in and by said act of 1857 and as subsequently amended by the act of March 26, 1868, hereinbefore mentioned, was and is a contract by the State of Missouri with relator which was not nor is subject to alteration, suspension, or repeal by the State of Missouri or by any municipality thereof; that
101 said city of St. Louis had not nor has lawful power by ordinance or otherwise to impair the obligation of said contract, nor to abridge or interfere with the full exercise by relator of any corporate franchise thereby granted to it; that the enforcement against said relator of said provisions of said ordinances of said city of St. Louis would be a denial to relator of its corporate rights and franchises aforesaid and would impair the obligation of the said contract of the said State of Missouri contained in relator's charter as amended and would be in contravention of section 15 of article II of the constitution of Missouri, 1875, forbidding the General Assembly to pass any law impairing the obligation of contracts, and also of section 10 of article I of the Constitution of the United States, forbidding any State to pass any such law, each of which constitutional provisions is hereby referred to and relied on by relator for the protection of its corporate rights and franchises aforesaid in this behalf.

Relator further shows to the court that the only condition annexed by its charter, as amended, to the exercise by relator of its right to establish and lay down in said city all pipes, fixtures, or

other thing properly required in order to carry on relator's said lighting business is that the same shall be done with as much dispatch and as little inconvenience to the public as possible, and avers not only that in making its arrangements and preparations to lay its wires under ground along and under the streets of said city as in its petition in this behalf alleged, and in applying to respondent as street commissioner of said city for a permit to make the necessary excavation therefor, relator has fulfilled every con-
102 dition to which it was or is lawfully subject in that behalf, but also that respondent in refusing to relator such permit did not allege as a ground for such refusal nor did in fact refuse such permit for the reason that by laying its wires under ground in the manner by it proposed relator would cause any inconvenience to the public, but expressly and unconditionally refused to permit relator to make any excavation in any street of said city.

Relator shows to the court that, as against this relator, the said ordinances and provisions above mentioned are not valid, legal, or binding enactments, nor constitute any defence to this proceeding—

Because, as relator avers, said provisions are not, so far as relator's rights are concerned, lawful or reasonable regulations of the use of the streets of said city, but were intended to and do prohibit relator from exercising its said charter rights and powers except upon compliance by relator with conditions which the city of St. Louis has not nor has the municipal assembly thereof any lawful right or power to impose on relator in that behalf, including as one of said conditions that relator shall first be duly authorized thereto by the municipal assembly, thereby impairing the obligation of the contract contained in relator's charter as amended.

Because the enforcement against relator by said city or any officer thereof of the conditions prescribed by said ordinances would not be a lawful or reasonable exercise of the power of said city under its charter to regulate the use of its streets or of the police power of said city, but is an attempt by said city under color of its charter powers to compel relator to enter into the obligations and to pay to
103 said city from time to time the tax of five per cent. upon the gross annual receipts from relator's business prescribed by section 590, article II, chapter 15, of the Revised Ordinance 1887, re-enacted as section 612, article II, chapter 15, of the Revised Ordinance 1892, above mentioned; forasmuch as it is provided by said section 590, article II, chapter 15, of the Revised Ordinance 1887, re-enacted as section 612, article II, chapter 15, of the Revised Ordinance 1892, that no person or persons, corporation or association shall be entitled to any of the privileges conferred by said article II, chapter 15, except upon fulfilling the several conditions in said section 612 prescribed, as hereinbefore set forth.

Because among the conditions prescribed by said section 590, re-enacted as section 612, relator would be compelled before availing itself of any of the rights or privileges mentioned in said article II, chapter 15, Revised Ordinance 1887, re-enacted as article II, chapter 15, Revised Ordinance 1892, to file with the city register its penal bond in the sum of twenty thousand dollars, conditioned that

relator will comply with all the conditions of said article II or with any ordinance which might thereafter be passed, and will comply with all regulations which may be made by the board of public improvements having reference to the subject-matter embraced in said article II or any ordinance therein named; all which requirements and conditions are a denial of relator's rights under its charter and impair the obligation of the contract contained therein as aforesaid.

Because said article II, chapter 15, Revised Ordinance 1887, re-enacted as article II, chapter 15, Revised Ordinance 1892, pur-
104 ports to authorize the board of public improvements of said city, in granting a permit for the use or occupation of the streets, alleys, and public places of said city for the purposes therein mentioned, to prescribe such restrictions, regulations, and qualifications as said board may think fit in respect of the use of said streets, alleys, and public places, and requires every person or corporation obtaining such permit, as a condition of availing itself of the privileges mentioned in said article II, to agree to comply with all such regulations made by said board, whereas the power to regulate the use of the streets of said city, granted — clause 2, section 26, of article III of its charter, is granted only to the mayor and assembly of said city, to be exercised by ordinance not inconsistent with the constitution or any law of this State or with said charter, and does not authorize the said mayor and municipal assembly or either of them by ordinance or otherwise to delegate to the board of public improvements of said city the power to make regulations for the use of said streets. Wherefore relator says that said requirements and said condition are unlawful and void.

And relator says that the several conditions and requirements prescribed in said article II, chapter 15, Revised Ordinance 1887, as amended and re-enacted in article II, chapter 15, Revised Ordinance 1892, are not independent of each other, but are so framed as to subject relator, its officers and agents, to the penalties prescribed in section 591 of Revised Ordinance 1887, re-enacted as section 613 of Revised Ordinance 1892, unless, before placing along, across, or under any street of the city of St. Louis any wires such as hereinbefore
105 mentioned, it, said relator, shall not only have obtained authority so to do from the municipal assembly of the city of St. Louis, but shall also have filed in the office of the board of public improvements of said city an application therefor, such as prescribed in section 583, Revised Ordinance 1887, re-enacted as section 605, Revised Ordinance 1892, and shall have obtained a permit therefor from said board, with such restrictions, regulations, and qualifications as by it prescribed, and shall also have filed with the city register its acceptance of all the terms of said article II, chapter 15, and shall therein agree as required by section 590, Revised Ordinance 1887, re-enacted as section 612, Revised Ordinance 1892, to file with the comptroller of said city sworn semi-annual statements of its gross receipts from its business and to pay to the city treasurer a tax of five per cent. upon the amount of such gross receipts, and shall also have filed with the city register its bond in the

sum of twenty thousand dollars, conditioned as prescribed in said section 590, Revised Ordinance 1887, re-enacted as section 612, Revised Ordinance 1892; all which requirements and conditions are a denial of relator's rights under its charter and impair the obligation of the contract contained therein as aforesaid.

Wherefore relator says that it was not under any legal obligation to apply to the municipal assembly of said city for authority, nor to the board of public improvements of said city for a permit, to place its wires under ground in any street thereof, and that it was the duty of respondent as street commissioner of St. Louis, under the provisions of section 568, article II, chapter 15, of the Revised Ordinance 1887 of said city of St. Louis, to issue to relator a permit for an excavation such as applied for by relator.

106 Relator denies that either on the 26th of March, 1868, or on the 2nd of March, 1857, lighting by electricity was wholly unknown to art. On the contrary, relator avers that long before either of said dates electricity had been used for illuminating purposes, and apparatus had been devised and publicly exhibited to great numbers of persons by means of which solid bodies were made incandescent by electric currents so as to produce light which could be and was used for purposes of illumination, substantially as hereinbefore set forth.

THE LACLEDE GAS LIGHT COMPANY, *Relator.*
By HENRY HITCHCOCK,
G. A. FINKELNBURG,
I. H. LIONBERGER, *Its Attorneys.*

And afterwards, to wit, on the 29th day of June, 1895, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* LACLEDE GAS LIGHT CO., Relator,
vs.
M. J. MURPHY, Respondent.

Comes now the said respondent, by attorney, and files his demurrer to relator's reply to this respondent's return herein.

Which said demurrer is in words and figures as follows, to wit:

In the Supreme Court of Missouri, April Term, 1895.

STATE *ex Rel.* LACLEDE GAS LIGHT COMPANY, Relator,
107 *vs.* No. 7434.
M. J. MURPHY, Street Commissioner, &c., Respondent.

Now comes said respondent and demurs generally to relator's reply to this respondent's return herein and assigns the following grounds therefor, to wit:

First. Because said reply does not state facts sufficient to constitute a defense to respondent's return.

Respondent further demurs specially to all that portion of re-

lator's return beginning at line 4 on page 1 with the words "that it, said relator, is advised," &c., and ending on line 12 of page 4 of said reply with the words "or any part thereof" and assigns the following grounds for this special demurrer, to wit:

1st. Because said matters are mere conclusions of law.

2nd. Because said matters do not show any right or power in relator to have or ask the rights prayed for in this proceeding.

3rd. Because said matters show on their face that relator's charter had expired prior to the institution of this proceeding, and therefore relator has no standing in court and no right to engage in business at all.

Respondent further demurs specially to all that part of relator's reply beginning at line 13 on page 4 thereof with the words "relator is advised and advers that even if the averment in respondent's return," &c., and ending on line 21 of page 6 thereof with the words "entirely avoided by placing said wires in said conduits" and assigns the following grounds for this special demurrer:

108 1st. Because it appears therefrom that relator has no power to manufacture or vend electricity.

2nd. Because it appears therefrom that electricity may be used for producing light and may be used in place of or as a substitute for gas-light, but it further appears that relator never had any power to manufacture or use the same.

3rd. Because it appears affirmatively from said reply that electricity is not a substance or material, and relator has no right to manufacture and vend the same.

Respondent further demurs specially to all that portion of relator's reply beginning at line 2 on page 7 with the words "relator admits that by art. 2, chap. 15, Rev. Ord. of the city of St. Louis 1887," &c., and ending at line 18 on page 13 with the words "as applied for by relator" and assigns the following grounds for this special demurrer, to wit:

1st. Because it affirmatively appears from such allegations of relator's reply that relator is subject to the police regulations contained in said ordinance provisions.

2nd. Because said ordinance provisions do not in any manner impair the obligation of any contract relator may have or at any time may have had, but they are valid regulations in any event.

Respondent further specially demurs to all that part of relator's reply beginning at line 19 on page 13 thereof with the words "relator denies that either on the 26th of March, 1868, or on the 2nd of March, 1857, lighting by electricity was wholly unknown to art" and ending on line 25 of page 13 thereof with the words "substantially as hereinbefore set forth" and assigns the following grounds for this special demurrer, to wit:

109 1st. Because, relator never having had the right to manufacture or vend electricity, it is not material to it or to this controversy whether or not electricity was know- to art on the 2nd of March, 1857, or on the 26th of March, 1868.

2nd. Because the act of 1868 did not confer any more power on relator in respect to lighting by electricity than was conferred by

the act of 1857, and relator is not entitled to the benefit of anything which became known to art in this respect between March 2nd, 1857, and March 26th, 1868.

Respondent respectfully prays the court to pass upon each and every one of the propositions herein raised. The questions have all been fully presented and must at no distant future date be decided, and it will be labor saved, both for the court and counsel, to have the whole matter passed upon in this proceeding.

Respondent is perfectly willing to have the court pass on all these questions on the arguments and briefs heretofore made and filed; but if the court is not sufficiently advised concerning all of said matters, then respondent respectfully prays that the court will set a time for hearing further argument in the premises.

Respondent earnestly prays the court to settle all these questions in this proceeding at this time because of the great pressing necessity to the city of St. Louis to have these matters settled, for their bearing on other pending questions in this city make it absolutely imperative that they should all be definitely decided, so that the city may know what its rights are in determining the questions now before it with reference to the use of its streets.

Respectfully submitted.

W. C. MARSHALL,
Att'y for Respondent.

110 And afterwards, to wit, on the 1st day of July, 1895, the further following proceedings were had in said cause, to wit:

STATE *ex Rel.* LACLEDE GAS LIGHT CO., Relator,
vs.
M. J. MURPHY, Respondent.

Come now the said parties, by attorney-, and file their stipulation that the city of St. Louis may be made a party respondent herein. Which stipulation is in words and figures as follows, to wit:

In the Supreme Court of Missouri. Court in Banc.

STATE *ex. Rel.* LACLEDE GAS LIGHT COMPANY, Relator,
vs.
MICHAEL J. MURPHY, Street Commissioner of the City of St. Louis, Respondent.
April Term, 1895. No. 7434.

It is hereby stipulated and agreed by and between the relator and the respondent in the above-entitled cause, by their respective attorneys, as follows:

1. That by consent of said parties respectively and by leave of said court the city of St. Louis may enter its appearance as a party to said cause, intervening therein for its own interest in respect of the several matters and things in the petition of relator and in the

alternative writ in this behalf set forth, and said city hereby
111 enters its appearance herein, and the said city of St. Louis, by like consent and leave of court, hereby adopts as its own the return heretofore filed by respondent to said alternative writ, and also adopts as its own the demurrer filed by said respondent.

HENRY HITCHCOCK,
G. A. FINKELNBURG,
I. H. LIONBERGER,
Attorneys for Relator.
W. C. MARSHALL,
Attorney for Respondent and for the City of St. Louis.

St. Louis, Missouri, June 28, 1895.

And afterwards, to wit, on the 2nd day of July, 1895, the further following proceedings were had in said cause, to wit:

THE STATE OF MISSOURI on the Relation of THE LACLEDE GAS LIGHT COMPANY, Relator,
vs.
MICHAEL J. MURPHY, Street Commissioner of the City of St. Louis, and The City of St. Louis, Respondents. } Mandamus.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court grants leave to the city of St. Louis to be made a party defendant herein and to adopt the return and demurrer heretofore filed by respondent Murphy, and thereupon, the said demurrer of respondents Murphy and The City of St. Louis to the reply of relator being submitted, and the court,
112 being now sufficiently advised of and concerning the premises, doth order and adjudge that the demurrer of respondents Murphy and The City of St. Louis to the reply of relator be sustained for the reasons given in the opinion heretofore rendered in this cause, to which reference is hereby made as part of this judgment. Thereupon in open court relator declines to plead further; and the court doth further order and adjudge that the peremptory writ of mandamus prayed for herein be, and the same is hereby, denied, and that the said respondents recover against the said relator their costs and charges herein expended and have therefor execution.

And afterwards, to wit, on the 2nd day of July, 1895, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* LACLEDE GAS LIGHT CO., Relator,
vs.
MICHAEL J. MURPHY and THE CITY OF ST. LOUIS, Respondents.

Now, at this day, there is presented to Hon. Theo. Brace, chief justice of the supreme court of Missouri, at chambers, a writ of error to reverse the judgment in the above cause, and a citation directed to said respondents, citing and admonishing them to be and appear at a Supreme Court of the United States on the first day of August,

1895, next; which said writ of error is allowed and said citation signed.

And afterwards, to wit, on the 6th day of July, 1895, the further following proceedings were had in said cause, viz:

113 STATE *ex Rel.* LACLEDE GAS LIGHT CO., Relator,
vs.
M. J. MURPHY *et al.*, Respondents.

Now, at this day, comes the said relator, by attorney, and files a supersedeas bond in the sum of fifteen hundred dollars; which said bond is approved and ordered made a part of the record herein.

Which said bond is in words and figures as follows, viz:

Know all men by these presents that we, The Laclede Gas Light Company, as principal, and —— ——, as sureties, are held and firmly bound unto Michael J. Murphy, street commissioner of the city of St. Louis, and The City of St. Louis in the full and just sum of fifteen hundred dollars, to be paid to the said Michael J. Murphy, street commissioner as aforesaid, and The City of St. Louis; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this second day of July, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at the April term, A. D. 1895, of the supreme court of the State of Missouri, in a suit depending in said court between The State of Missouri *ex rel.* The Laclede Gas Light Company, relator, plaintiff in error, and Michael J. Murphy, street commissioner of the city of St. Louis, and The City of St. Louis, respondents, defendants in error, judgment was rendered against the said plaintiff in error, and the said plaintiff in error having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Michael
114 J. Murphy, street commissioner of the city of St. Louis, and The City of St. Louis, citing and admonishing them to be and appear at a Supreme Court of the United States to be held at Washington, D. C., not exceeding thirty days from the date of the citation in said cause:

Now, the condition of the above obligation is such that if the said plaintiff in error shall prosecute said writ to effect and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

THE LACLEDE GAS LIGHT CO., [SEAL.]
By A. ROSS, *Secretary & Gen'l Mg'r.*
GEORGE A. MADILL. [SEAL.]
J. C. VAN BLARCOM. [SEAL.]

[L. S.] Attest: A. ROSS, *Sec'y.*

Sealed and delivered in presence of—

—— ——.

Approved by—
THEO. BRACE, *Judge.*

STATE OF MISSOURI, *set:*

I, Jno. R. Green, clerk of the supreme court of the State of Missouri, certify that the foregoing is a full, true, and complete transcript of the record and proceedings in the case of The State *ex rel.* The Laclede Gas Light Company, relator, *vs.* Michael J. Murphy, street commissioner of the city of St. Louis, and The City of St. Louis, respondents, as fully and complete as the same appears of record and on file in my said office.

Seal of the Supreme Court of Missouri.

Witness my hand as clerk and the seal of said court, hereto affixed. Done at office, in Jefferson City, Mo., this 13th day of July, A. D. 1895.

JNO. R. GREEN, *Clerk.*

Endorsed on cover: Case No. 15,957. Missouri supreme court. Term No., 667. The State of Missouri *ex relatione* The Laclede Gas Light Company, plaintiff in error, *vs.* Michael J. Murphy, street commissioner of the city of St. Louis, and The City of St. Louis. Filed July 24th, 1895.

Dec. Term 1895. No. 447.

Brief of Hitchcock for P. in E.

DEC 30

Supreme Court U.S.

BRIEF FOR PLAINTIFF IN ERROR.

Filed Dec. 30, 1895.

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE STATE OF MISSOURI EX REL. THE LACLEDE GAS LIGHT CO.,
Plaintiff in Error,
vs.
MICHAEL J. MURPHY, STREET COMMISSIONER OF ST. LOUIS, AND THE CITY OF ST. LOUIS,

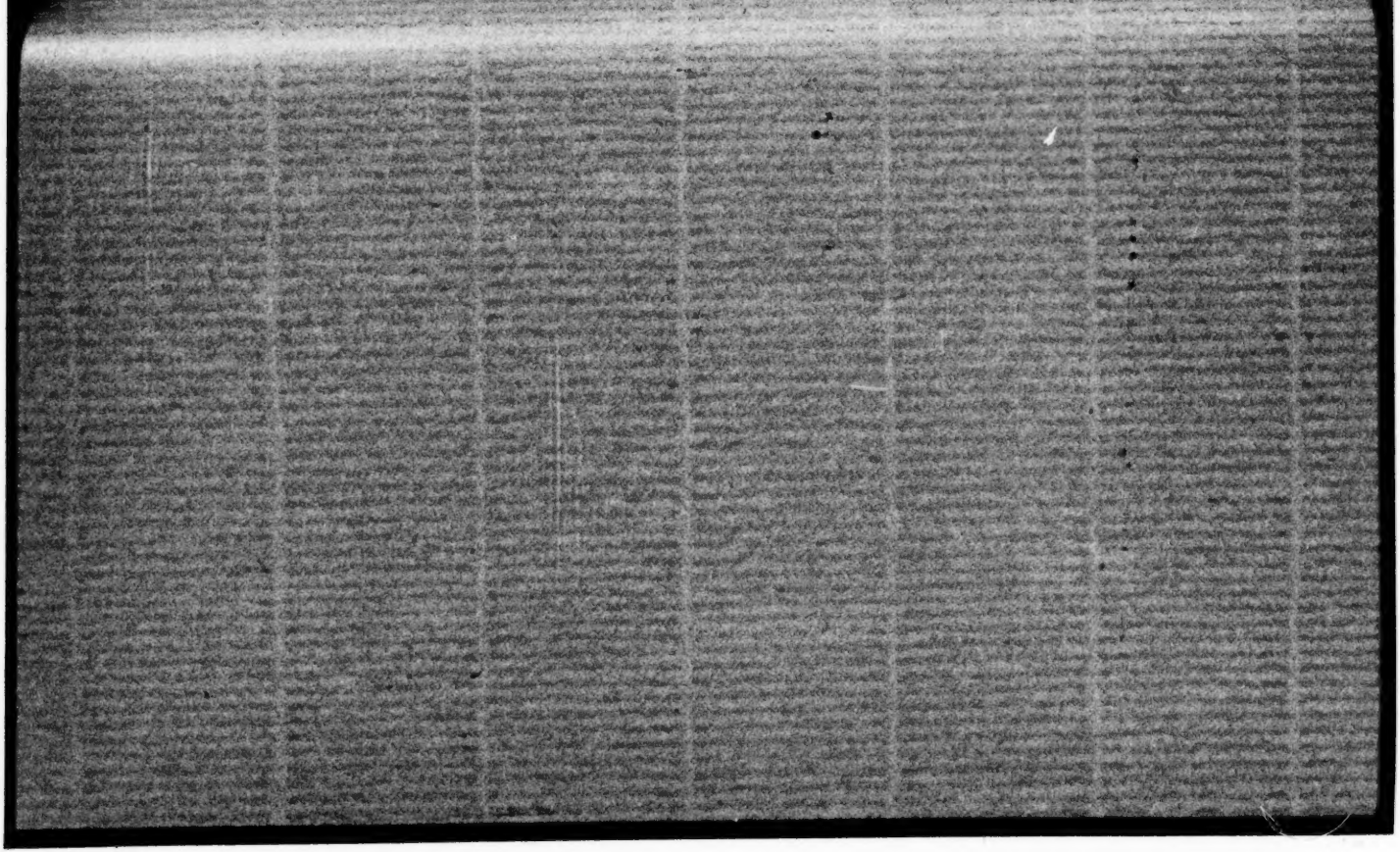
No. 447.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

Brief and Argument of

HENRY HITCHCOCK,

for Counsel for Plaintiff in Error.



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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE STATE OF MISSOURI *ex relatione* THE LACLEDE GAS-LIGHT COMPANY,
Plaintiff in Error,

vs.

MICHAEL J. MURPHY, STREET COMMISSIONER OF THE CITY OF ST. LOUIS, AND THE CITY OF ST. LOUIS,
Defendant in Error.

No. 667.

STATEMENT OF CASE FOR PLAINTIFF IN ERROR.

(The references are to the pages of the printed record.)

This was an original proceeding in the Supreme Court of Missouri[1] by the Laclede Gas Light Company, relator, plaintiff in error, for a peremptory writ of mandamus against Michael J. Murphy, Street Commissioner of the City of St. Louis: to which the City of St. Louis afterwards also became a party respondent, its appearance being entered by consent of parties and leave of court.[2]

[1] Printed Record, p. 4.

[2] Id., p. 60.

Proceedings in the Cause.

On November 26, 1894, relator filed its petition in said court [1] for a writ of mandamus, to issue against Michael J. Murphy, Street Commissioner of the City of St. Louis,[2]—

"commanding him to issue a permit to the relator to make an excavation along the east side of Broadway, [one of the public streets of said city,] as near the curb as practicable, and extending from the southeast corner of Mound Street and Broadway to the southeast corner of Olive Street and Broadway, in so far as such excavation may be necessary for the purpose of laying relator's electric wires underground, the same to be done with as much dispatch and as little inconvenience to the public as possible."

On December 10, 1894, an alternative writ was issued by Division No. 1 of said Supreme Court [3] in accordance with the prayer of said petition, returnable on January 14, 1895,[4] on which day respondent filed his return, showing cause against the issue of a peremptory writ.[5] On January 24, 1895, relator filed its special demurrer to certain parts,[6] also its motion to strike out other parts, of said return,[7] which were set down for argument on February 18, in Division No. 1 of said Court; but on that day said cause was transferred by the court, on its own motion, to the Supreme Court *in banc*, where said demurrer and motion were argued and submitted on March 19.[8] On June 18, final judgment was rendered, denying the peremptory writ prayed for by relator, upon the grounds stated in the opinion of the court:[9] but on June 25, on motion of relator, said judgment was set aside, said demurrer and motion to

[1] Id., p. 4.
[2] Id., p. 9.
[3] Id., p. 17.
[4] Id., p. 23.
[5] Id., pp. 24–28.
[6] Id., pp. 29–32.
[7] Id., pp. 32–36.
[8] Id., p. 36.
[9] Id., p. 37.

strike out being overruled, and leave granted relator to plead further.[1]

On June 28 relator filed its reply to respondent's return;[2] to which, on June 29, respondent filed a general demurrer, also specially demurring to certain parts thereof:[3] and on July 1 the City of St. Louis, being made a party respondent by consent of parties and leave of court, entered its appearance in said cause and adopted as its own the return of respondent to the alternative writ, and respondent's demurrer to said reply.[4] On July 2, without further argument, the court made an order in said cause sustaining the demurrer of said respondents to relator's reply to the return of said respondents, "for the reasons given in the opinion heretofore rendered in this cause, to which reference is hereby made as part of this judgment."[5]

Relator thereupon declining in open court to plead further, final judgment was entered on July 2, 1895, denying the peremptory writ prayed for. On the same day, July 2, a writ of error from this Court to reverse said judgment, sued out by relator, was allowed and citation signed by the Honorable Theodore Brace, Chief Justice of said Supreme Court of Missouri;[6] due service of said citation being on the same day acknowledged for both said respondents by their attorney of record.[7] A supersedeas bond tendered by relator having been filed and approved[8] on July 6, on which day relator also filed its assignment of errors,[9] the clerk of said Supreme Court of Missouri made due return to said writ of error on July 12, and on July 24, 1895, the transcript in said cause was filed and docketed in this Court.

[1] Id., p. 46.
[2] Id., pp. 46–58.
[3] Id., pp. 58–60.
[4] Id., p. 60.
[5] Id., p. 61.
[6] Id., p. 62.
[7] Id., p. 1.
[8] Id., p. 62.
[9] Id., p. 3.

Pleadings: Opinion and Judgment.

Following is a summary of the pleadings in said cause.

Relator's petition

Avers[1] that relator was duly incorporated by an Act of the General Assembly of Missouri approved March 2, 1857, subsequently amended by an Act approved March 3, 1857, and an Act approved March 26, 1868, which Acts are respectively in the words and figures following.

An Act to incorporate "The Laclede Gas Light Company."

Be it enacted by the General Assembly of the State of Missouri, as follows:

§ 1. James M. Hughes, Edward Bredell, Robert Holmes, John C. Rust, Charles Gibson, Samuel H. Gardner, Henry A. Clover, and Archibald Gamble be, and they are hereby created and constituted a body politic and corporate, by the style of "The Laclede Gas Light Company," and by that name they and their successors and assigns shall have perpetual succession, may contract and be contracted with, sue and be sued, and may also hold and convey, or otherwise manage and dispose of such property, real, personal and mixed, as may be necessary for the purposes of said corporation and the prosecution of its legitimate business.

§ 2. The capital stock of said company shall be fifty thousand dollars, and the same may be increased to two million dollars, which shall be divided into shares of one hundred dollars each.

§ 3. The affairs of said company shall be conducted by a board of not less than five directors, and such officers and agents as they may deem necessary, said directors to be chosen annually by the stockholders, each share of stock being entitled to one vote in such election, and they shall hold their offices for one year, and until their successors

[1] Pr. Rec., p. 17.

are elected and qualified; said directors shall have power to ordain and make all needful by-laws, rules and regulations, for the transaction of the business of said company, and under the direction of the stockholders, may have absolute power over all the property and effects of said company. They may also fill vacancies in their board until the next regular election.

§ 4. The said corporators, or a majority of them, may at any time, open books in the city of St. Louis for subscription to the capital stock of said company, and, upon the sum of fifty thousand dollars being subscribed, may organize said company under this charter.

§ 5. The said company, its successors and assigns, shall within all that portion of the present corporate limits of the city of St. Louis, in St. Louis County, not embraced within the corporate limits of said city, as established by the act entitled "An Act to incorporate the city of St. Louis," approved February 8, 1839, have and enjoy, during the continuance of this act, the sole and exclusive privilege and right of lighting the same, and of making and vending gas, gas-lights, gas-fixtures, and of any substance or material that may be now or hereafter used as a substitute therefor; and to that end, may establish and lay down in said portion of said corporate limits, all pipes, fixtures, or other thing properly required, in order to do the same (the same to be done with as much dispatch and as little inconvenience to the public as possible), and shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company.

§ 6. The city of St. Louis and said company may make any contracts they may deem to their mutual advantage, in regard to the lighting of any parts of said portion of said corporate limits, or any other thing relating to the business and affairs of said company. The said city shall have the right at the expiration of twenty years from the time of the organization of said company, under this charter, to purchase all the property and effects of the same, paying therefor to the same the value of such property and effects, with twenty per cent added thereto, such value to be fixed by two appraisers, one to be chosen by

the city and the other by the company, and if they cannot agree, then the two thus chosen shall nominate a third man, and a decision of any two of the three shall be binding; and upon such purchase being made, all such property and effects, and all rights and privileges granted to said company shall immediately pass to and vest in said city. If said city fail so to purchase said property and effects, then this charter shall be and the same is hereby renewed and extended for the further period of thirty years after the expiration hereof.

§ 7. Any person or body corporate who shall, within said portion of said corporate limits, interfere with the privileges hereby granted to said company, or exercise like acts or privileges, shall, for every such offense, forfeit and pay to said company one thousand dollars, and each day's continuance of such offense shall be construed to be, and be, a new offense, under this section.

§ 8. The said company and this act is hereby exempted from the operation of sections 6, 7, 13, 14, 15, 18, and 20, of article first of the act entitled, "An Act concerning Corporations," approved November 23, 1855.

§ 9. This act shall take effect from its passage, and shall continue in force for thirty years.

Approved March 2, 1857.

An Act supplementary and amendatory of an act entitled "An Act to incorporate the Laclede Gas Light Company."

Be it enacted by the General Assembly of the State of Missouri, as follows:—

§ 1. The act to which this act is amendatory is hereby amended as that the words "sole and exclusive," in the fifth section of the act are stricken out.

§ 2. The city of St. Louis shall not be compelled, in any purchase which it may make under the sixth section of the before recited act, to pay more than the appraised value of the property and effects of the corporation created by said act, without any addition of percentage.

This act to take effect and be in force from and after its passage.

Approved March 3, 1857.

An Act to amend an act to incorporate The Laclede Gas Light Company, approved March 2, 1857.

Be it enacted by the General Assembly of the State of Missouri, as follows: —

Section 1. The said Laclede gaslight company shall and may, within the corporate limits of the city of St. Louis, as the same are now or may hereafter be established, exercise, have, hold, and enjoy forever, all the rights, privileges, and franchises granted to it by the fifth section of the act to which this act is amendatory, and may at any time lease, sell or dispose of any portion of said rights, privileges and franchises to individuals, associations or corporations, intending or desiring to exercise the same within any portion of the limits aforesaid.

Sec. 2. The capital stock of said company may be increased from time to time to such amount as may be necessary to carry on its business.

Sec. 3. Nothing in this act contained shall be construed as affecting the vested rights of the St. Louis gaslight company; and the sixth section of the said act to which this act is amendatory, is hereby repealed.

Sec. 4. An act entitled an act supplementary to and amendatory of an act entitled an act to incorporate the Laclede gaslight company, approved March 3, 1857, is hereby repealed.

Sec. 5. This act shall take effect from its passage.

Approved March 26, 1868.

That said Act of March 2, 1857, so amended, constitutes relator's charter, under which it has organized and carried on business and which is in full force:

That by said charter relator is granted

— "the privilege and right of lighting the city of St. Louis throughout its corporate limits and of making and vending gas, gas lights, gas fixtures, and any substance or material that may be now or hereafter used as a substitute therefor; and to that end may establish and lay down in any portion of said corporate limits all pipes, fixtures, or

other thing properly required in order to do the same, with this limitation only, that in laying down pipes, fixtures or other thing properly required therefor, relator shall do the same with as much dispatch and as little inconvenience to the public as possible."

That by said charter relator is invested with all other powers necessary to execute and carry out the privileges and powers so granted; but that on February 28, 1873, there was executed by and between the city of St. Louis, the St. Louis Gas Light Company and this relator, an agreement, known as the "Tripartite Agreement," in and by which relator abandoned and surrendered all *exclusive* rights and all claim to any *sole or exclusive* right of lighting said city, &c., under its charter.

It is further averred,—

Relator further states that in pursuance of the terms of said charter it has for a long time past been engaged in the lighting business, both by gas and electricity; that under a contract with the city of St. Louis it is lighting a part of the public streets and alleys of said city by electricity, and will be obliged to do so for a number of years to come; that it is furnishing light by means of gas or electricity to many thousand private consumers in said city, being a large part of the inhabitants thereof; that in order to fulfill its obligations to the city and the public under its charter it has erected and maintains extensive and costly plants for the manufacture and distribution of gas as well as for generating and distributing electric currents; that for distributing gas it has from time to time constructed and maintained and now maintains a system of pipes laid under ground along the streets of the city of St. Louis as it was at all times authorized to do by its said charter, nor has the city of St. Louis ever objected to its so doing or disputed relator's right to do so; that for the distribution of electricity relator has hitherto used overhead wires strung upon poles along the streets and alleys of said city, which poles and electric

wires have been and are maintained and used by relator without objection by said city or the authorities thereof, for the distribution of electricity, as well to furnish light to private consumers as for the fulfillment by relator of its said contract with said city of St. Louis for the lighting by electricity of certain public streets and alleys thereof; that to effect such distribution it is necessary to transmit through and by means of said wires electric currents of great power, which if and when accidentally diverted are dangerous to human life and property; that in order to avoid the increasing inconvenience and danger to the public necessarily incident to that method of distributing electric currents and in order to provide more effective and proper service, relator has made arrangements to lay its wires underground along and under the streets of said city, according to approved and practicable plans and is now ready to do so with as much dispatch and as little inconvenience to the public as possible.

That respondent Murphy is Street Commissioner of the City of St. Louis, having, as such, the supervision and control of the streets and alleys of said city and the enforcement of city ordinances relating thereto.

That on October 30, 1894, having given notice thereof to said Street Commissioner (respondent), relator began the work of excavating at a point on Broadway, a public street in said city, near Mound street, adjacent to relator's generating plants, which work was proper and necessary for laying its wires underground: but respondent stopped said work and caused relator's men to be arrested, notifying relator that he would not allow any part of any street to be excavated for any purpose without a permit previously obtained from him as required by ordinance.

That by Section 568, Article I, Chapter XV, Revised Ordinance, 1887, of the City of St. Louis, it is provided that —

"No person shall make or cause to be made any excava-

tion on any public street, highway or alley, without written permission of the street commissioner so to do excepting public work done under the authority of the water or sewer commissioner, who at the time of ordering any such excavating shall notify the street commissioner of the same."

That relator then applied to respondent, as Street Commissioner, for a permit to make such excavation, so that it might lay its wires under ground for the purposes aforesaid and in pursuance of its charter rights and privileges; but respondent arbitrarily and unlawfully refused and still refuses to issue to relator any permit to excavate any part of any street of said city for said purpose, or to permit relator to make any such excavation without a permit, and threatens to cause the arrest of any person who may begin any such excavation for said purpose of laying any wire of relator's under ground; so that relator has been and is by said street commissioner absolutely prevented from exercising one of its vested rights granted by the State of Missouri and hitherto exercised by relator without let or hindrance, viz.: to lay down in the streets of St. Louis all pipes, fixtures, or other thing properly required, in order to carry on the business for which relator's corporation was organized.

That it was and is the duty of respondent, as such Street Commissioner, to issue such permit to relator, so that relator may, without interference by the police or other authorities of said city, exercise its charter powers and rights in that behalf above mentioned.

That by reason of the premises, relator is without other remedy, and therefore prays—

That a writ of mandamus may issue against said Michael J. Murphy, street commissioner of the city of St. Louis, commanding him to issue a permit to the relator to make

an excavation along the east side of Broadway as near the curb as practicable and extending from the southeast corner of Mound street and Broadway to the southeast corner of Olive street and Broadway, in so far as such excavation may be necessary for the purpose of laying relator's electric wires under ground, the same to be done with as much dispatch and as little inconvenience to the public as possible. And relator prays for such other process, orders and remedies as may to the court seem meet and proper.

Respondent's return

Admits[1] that by said Act of March 2, 1857, amended by said Act of March 3, 1857, relator became a body corporate, and that the General Assembly of Missouri passed said Act of March 26, 1868; the several provisions of said Acts being set out in said return; but avers[2] —

That said Act of March 26, 1868, is unconstitutional, null and void, and in conflict with Section 2, Article VIII of the Constitution of Missouri of 1865, which provides as follows:—

"No law shall be passed reviving or re-enacting any Act heretofore passed, creating any private corporation, where such corporation shall not have been organized and commenced the transaction of its business, within one year from the time such Act took effect, or within such other time as may have been prescribed in such Act for such organization and commencement of business."

That relator did not within one year from the time the Act of March 2d, 1857, took effect, organize, neither did it commence the transaction of its business within one year after the said Act of March 2nd, 1857, took effect, but, on

[1] Id., p. 24. [2] Id., p. 25.

the contrary, said Laclede Gas Light Company did not commence business until the year 1873; and therefore that the Act approved March 26th, 1868, was in conflict with said Section 2, Art. 8, of the constitution of 1865; and respondent further avers that said Act of March 26, 1868, was an act reviving and re-enacting the Act of March 2, 1857.

Also that said Act of March 26, 1868, is null and void and in conflict with Section 25 of Article IV of the Constitution of Missouri of 1865, which is as follows:

"No Act shall be revived or re-enacted by mere reference to the title thereof; nor shall any Act be amended by providing that designated words thereof shall be struck out, or that designated words shall be struck out and others inserted in lieu thereof; but in every such case the Act revived, or re-enacted, or the Act or part of Act amended, shall be set forth and published at length, as if it were an original Act or provision."

Also that the charter of the relator by the terms of Section 9 of the Act of March 2, 1857, expired on March 2nd, 1887, and that relator therefore is not entitled to any of the privileges, rights, or franchises claimed by it:

Also, for further and separate return,[1] that relator is not entitled to the relief asked for in this case, because respondent says that relator has never, by any Act, been granted a franchise to make and vend electricity for any purpose whatever, but that whatever rights, privileges and franchises it ever enjoyed were confined to making and vending gas, gas-lights, gas-fixtures and any substance or material used as a substitute therefor, and that electricity whether used for lighting or power purposes is not a substance or material, and hence relator has not any right to make or vend the same anywhere.

[1] Id., p. 27.

It is further averred[1] —

That relator has heretofore placed its pipes and fixtures beneath the surface of the street on the east side of Broadway from Mound street to Olive street, and at divers and sundry other places beneath the surface of the streets of the city of St. Louis, for the purpose of transmitting and vending and supplying gas to consumers in the city of St. Louis; that in order to convey electricity it is necessary to carry the same by means of wires strung on poles above the surface of the streets or by means of wires strung in non-conductive tubes or conduits beneath the surface of the streets, and that relator has never acquired from the State of Missouri or the city of St. Louis, any right to place such wires above or beneath the streets of said city; that it is provided by Sec. 2721 of Art. 5, of Chap. 42, Rev. Stats. 1889, that no company shall place its wires and other fixtures under ground in any city unless it shall first obtain consent from said city, through the municipal authorities thereof; and that it is provided by Art. 2, Chap. 15, Rev. Ordinance of the city of St. Louis, 1887, as the same has been amended by Ord. No. 16,894, that no wires, tubes or cables conveying electricity for the production of light, heat or power, shall hereafter be placed along or across any of the streets, alleys or public places in the city of St. Louis, by any person, corporation or association not having, previous to the passage of this ordinance, accepted and complied with ordinance No. 12,723, now amended, or shall be duly authorized by the municipal assembly, and then only upon condition that such person, corporation or association so authorized by ordinance, before placing its wires, tubes and cables under ground shall file in the office of the Board of Public Improvements an application therefor, stating in detail the streets, alleys or public places which said wires, tubes or cables are to occupy, and the manner in which said wires, tubes or cables are to be secured or supported and insolated, together with a plat showing the route of such wires, tubes and cables, and that thereupon if the same is approved, the Board of Public Improvements shall grant a permit there-

[1] Id., p. 27.

for, subject to such restrictions, regulations and qualifications as may be prescribed by said board, and all such work shall be done under the supervision of and to the satisfaction of the supervisor of city lighting; and that whenever an alley is available for placing such wires, tubes or cables, the same shall be placed in or under alleys and not along or under streets; that relator has never accepted the provisions of said article and chapter, nor of said ordinance No. 16,894, nor has it ever been authorized by the Municipal Assembly of St. Louis to place its wires, tubes and cables under the streets or alleys of St. Louis.

That said ordinance provisions are valid under Paragraph 2, Section 26, Article III of the charter of St. Louis, which gives said city the power to regulate the use of all streets, avenues, alleys, &c., in said city; and are legal enactments notwithstanding any rights which relator now has or may heretofore have had by virtue of any Act of the General Assembly of Missouri:

That relator has never made application to the Board of Public Improvements for a permit to place its wires, tubes and cables underground in said city, nor has complied in any manner with any of the ordinance provisions aforesaid, and that respondent has not the power to grant any such permit as is asked for by relator:

Further[1] that on March 2, 1857, and likewise on March 26, 1868, lighting by electricity was wholly unknown to art, and that the General Assembly of Missouri did not and did not intend to confer upon relator, by either of said Acts, the right to make or vend electricity for lighting purposes.

Demurrer to, and motion to strike out, parts of return.

Said demurrer, and motion to strike out, are set out in the record,[2] also the opinion of the court overruling the

[1] Id., p. 28.

[2] Id., pp. 29, 32.

same,[1] which action of the court is assigned for error; [2] but are omitted here, all questions of law arising thereon being again presented by relator's reply to said return [3] and the demurrer of said respondents thereto,[4] sustained by the court upon the same grounds stated in said opinion, which ruling is also assigned for error.[5]

Reply to Respondent's return.

To said return, relator filed its plea or reply, both as to law and fact, in substance averring as follows:—

That said Act of March 26, 1868, is not unconstitutional or void, nor in conflict with any provision contained in Article VIII of the Constitution of Missouri, 1865; but is a valid amendment of said Act of March 2, 1857.

That by Section 8 of said Act of March 2, 1857, said relator and said Act incorporating it were exempted from the operation of Sections 6, 7, 13, 14, 15, 18 and 20 of Article 1 of the Act entitled "An Act concerning corporations," approved November 23, 1855.

Sections 6 and 7, respectively, of said last mentioned Act are as follows:—

"Sec. 6. If any corporation hereafter created by the legislature shall not organize and commence the transaction of its business within one year from the date of its incorporation, its corporate powers shall cease.

"Sec. 7. The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal in the discretion of the legislature."

That being so exempted from the operation of Section 6 of said Act of November 23, 1855, relator was not required

[1] Id., p. 37.
[2] Id., p. 3.
[3] Id., p. 46.
[4] Id., p. 58.
[5] Id., p. 3.

to organize nor to commence business within one year from the date of its incorporation, nor was any time prescribed in its charter, to wit, said Act of March 2, 1857, or said amendatory Act of March 26, 1868, for such organization or commencement of business:

And being also exempted from the operation of said Section 7 of said Act of November 23, 1855, relator's charter became and was a contract between the State of Missouri and said corporation, which was not nor is subject to alteration, suspension or repeal by said State of Missouri or by any legislative Act or provision of the constitution thereof subsequently adopted, except with the consent of said corporation: and in virtue of the provisions contained in said charter, especially in Sections 1 and 4 of said Act of March 2, 1857, the corporators and stockholders of relator had the right under said charter to organize said corporation and to commence the transaction of its business at any time after said Act of March 2, 1857, took effect, without reference to the provisions of said Act of November 23, 1855, and without reference to any Act of the General Assembly or any provision of the constitution of said State which might thereafter be enacted or adopted: and further,

That by an Act of the General Assembly of Missouri approved February 4, 1837, incorporating the St. Louis Gas Light Company, amended by an Act approved February 11, 1839, said Gas Light Company had the exclusive right of vending gas lights in the City of St. Louis and its suburbs for twenty-five years from January 1, 1840, and, in the event that the City of St. Louis did not purchase its property, until January 1, 1890; that on March 2, 1857, and until the year 1873, said charter of the St. Louis Gas Light Company was in full force, relator being thereby precluded from selling gas and gas light in said city without the consent of said St. Louis Gas Light Company,

which was not obtained until 1873, and therefore relator did not begin to manufacture and sell gas until the year 1873:

Wherefore, the several averments in said return in respect of the time when relator organized as a corporation, and when it commenced the transaction of business, constitute no defense to this proceeding.

Relator denies that it did not organize as a corporation within one year from the time when said Act of March 2, 1857, took effect: averring, on the contrary, that during the year 1857, the corporators therein named, all being present, met in the city of St. Louis, accepted said charter, opened books for subscriptions to the capital stock of said company, the entire amount whereof was then and there subscribed, and said company was thereupon organized by electing five directors and a president and secretary of said corporation; and further avers that said corporation commenced business long before the year 1873:

Further avers that said Act of March 26, 1868, is not void nor in conflict with any provision in Article IV, Section 25, of the Constitution of Missouri of 1865, nor is an Act reviving or re-enacting said Act of March 2, 1857; nor does said Act of March 26, 1868, revive or re-enact or purport to revive or re-enact said Act of March 2, 1857, by mere reference to the title thereof; nor does it amend or purport to amend said Act of March 2, 1857, by providing that designated words thereof shall be struck out, or that designated words thereof shall be struck out and others inserted in lieu thereof: wherefore relator says that the several averments in said return setting forth the grounds upon which as alleged said Act of March 26, 1868, violates Section 25 of Article IV of the Constitution of Missouri, 1865, and is therefore null and void, are immaterial and constitute no defense to this proceeding; and further

Denies that by the terms of section 9 of said Act of

March 2, 1857, relator's charter expired, as alleged, on March 2, 1887; avers that though said Laclede Gas Light Company, relator, was duly organized as a corporation in the year 1857, the city of St. Louis did not at the expiration of twenty years from the time of the organization of said company, nor at any time, purchase or offer to purchase the property and effects of said company or any part thereof:

Avers that even if it were true, as averred in said return, that electricity is not a substance or material, which relator denies, said averment is immaterial, and constitutes no defense to this proceeding; and further,—

That the object for which relator was incorporated, as set forth in said Act of March 2, 1857, and referred to in said Act of March 26, 1868, amendatory thereof, was to carry on the business of lighting the city of St. Louis, as well the public streets and alleys of said city as the private and public buildings thereof; that by said charter was granted to relator the right and privilege of lighting the said city and of making and vending gas, gas-lights, gas-fixtures, and any substance or material that might at the date of said charter, to-wit, on March 2, 1857, or at any time thereafter, be used as a substitute therefor, and to that end relator was expressly empowered to establish and lay down in any part of the corporate limits of said city as then or thereafter established all pipes, fixtures or other thing properly required to do the same, the same to be done with as much dispatch and as little inconvenience to the public as possible.

That for the purpose of lighting a city, or to illuminate any space therein, whether a public street or alley, or a building or any portion thereof, it is necessary to produce artificial light in the space to be illuminated; that artificial light is produced by making incandescent, that is to say, by bringing to a condition of white heat, in which it gives out light, any substance or material capable of being so used: that in order to light said city as aforesaid, relator was expressly authorized by its charter to make and vend

not only illuminating gas, but any substance or material which might then or thereafter be used as a substitute therefor, and to that end to establish and lay down at any point within the corporate limits of said city all pipes, fixtures or other thing properly required to do the same: that illuminating gas is a highly inflammable compound of carbon and hydrogen, chemically combined in certain fixed proportions: that in order to use said gas for illuminating purposes, it must be set on fire, which decomposes said gas, setting free the carbon therein, in the form of fine particles, and rendering said carbon particles incandescent, which produces what is called gas light.

That light may also be produced from carbon, by means of electricity, to wit, by using carbon, not compounded with any other element, in the form of rods or filaments, which may be and are brought to a condition of incandescence by transmitting into or through said carbon rods or filaments what is called electricity, by means of apparatus suitable therefor; the result being that the carbon thus rendered incandescent gives out what is called electric light, which has greater illuminating power than gas light and is commonly used as a substitute therefor, as well for the illumination of public streets and places as of public and private buildings in many cities throughout the United States.

That the right and privilege of lighting the city of St. Louis as aforesaid granted by its charter to relator, includes the production of light in the manner last above described, to wit, by making carbon or any other suitable substance incandescent by means of electricity, equally with the right or privilege of making and using carbon in its compound form of illuminating gas, and by making it incandescent in the manner above stated, to wit, by the application of heat: carbon being in either case the substance or material which is made incandescent, thereby producing light, though when illuminating gas is used, the carbon is in a compound form, the particles thereof being set free and made incandescent by heat as above stated, producing what is called gas light, while in the production of electric light pure carbon is used as a substitute for gas, and is made incandescent by the application of electricity.

It is true, as in said return alleged, that relator, therein exercising its corporate franchise of lighting the city of St. Louis, and of vending gas and gas light, has heretofore established, placed and laid down certain pipes and fixtures beneath the surface of the street on the east side of Broadway from Mound Street to Olive Street, and at divers and sundry other places beneath the surface of the streets of said city of St. Louis, for supplying gas to its consumers; and by means thereof relator has during more than ten years last past carried on, and still carries on, its business as a lighting company, of all which said city and the municipal authorities thereof had notice and have at all times acquiesced therein.

It is also true that in order to produce or furnish light by means of electricity, it is necessary to use wires for conducting the same, and to support said wires either on poles above the surface of the streets, as relator is now doing under a contract with said city of St. Louis, or in tubes or conduits beneath said surface. Relator states that its purpose in making the excavation on Broadway, mentioned in said petition, was to construct and place underground a conduit for wires, such conduit and wires being properly required for the production of electric light as a substitute for gas light: that the conduit and wires intended by relator to be so laid down are of the most approved description, such as are used for like purposes in other cities, said conduits occupying when completed a space not exceeding thirty inches in width under the surface of the street, with provision for access thereto at suitable intervals through manholes properly covered and protected, less than forty inches in width at the surface of the street: the said conduits and manholes when completed and in use, offering no obstruction whatever to the use of the streets for travel and traffic, and the danger to life and property which attends the use of overhead electric wires, such as relator is now using under contract with said city of St. Louis for the purpose of lighting public streets and alleys therein, being entirely avoided by placing said wires in said conduits.

Denies that relator never acquired from the State of

Missouri any right to place such wires above or beneath the streets of said city:

Denies that it is provided by Section 2721, Article V, Chapter 42, Revised Statutes of Missouri, 1889, that no company shall place its wires or other fixtures underground in any city unless it shall first obtain the consent of said city through the municipal authorities thereof:

Avers that if the provisions of said Section 2721 purported to apply to relator, they would be invalid, as impairing the obligation of the contract contained in relator's charter; but that said Article V of Chapter 42 is part of the general corporation law of Missouri, and said Section 2721 in terms applies exclusively to corporations organized thereunder for the purpose of constructing or maintaining telephone or telegraph lines:

Admits that by Article II, Chapter XV, Revised Ordinance of the City of St. Louis, 1887, amended by Ordinance No. 16,894, the municipal authorities of said city undertook to prescribe conditions for placing wires, tubes and cables conveying electricity along the streets and alleys of said city, but avers that the provisions of said ordinance are not fully set forth in respondent's return:

That said ordinances in said return mentioned were reenacted by Article II, Chapter XV of the Revised Ordinance of said City of St. Louis, 1892, to-wit, Ordinance No. 17,188, approved April 7, 1893, being Sections 603 to 614, both inclusive, of said Revised Ordinance, 1892; which sections, since April 17, 1893, were and are the only existing ordinances of said city prescribing any such conditions, and are the ordinances referred to in said return, and are in the words and figures following:

Article II. *Of electric wires, tubes and cables.*

Sec. 603. *Conditions as to placing wires, etc.* — That no wires, tubes or cables conveying electricity for the production of light, heat or power shall hereafter be placed along or across any of the streets, alleys or

public places in the city of St. Louis, by any person, corporation or association not having previous to the passage of this ordinance, accepted and complied with ordinance number twelve thousand seven hundred twenty-three, now amended, or shall be duly authorized by the municipal assembly, and then only as hereinafter provided. (Revised Ordinance 1887. Sec. 581. Amended.)

Sec. 604. *Wires to be placed as prescribed by board.* — All such wires, tubes or cables, along or across any of the streets, alleys or public places of the city of St. Louis shall be placed at such distances above or below the surface of the ground, and secured in such manner as shall be prescribed by the board of public improvements. (Revised Ordinance 1887. Sec. 582.)

Sec. 605. *Application and plat to be filed.* — That any person or persons, corporation or association, duly authorized by ordinance to do business in the city of St. Louis and desiring to place along or across any of the streets, alleys or public places of the city of St. Louis, such wires, tubes or cables, shall file in the office of the board of public improvements an application therefor, stating in detail the streets, alleys or public places which said wires, tubes or cables are to occupy, and the manner in which said wires, tubes or cables are to be secured or supported and insulated, together with a plat showing the route of such wires, tubes or cables. (Revised Ordinance 1887. Sec. 583.)

Sec. 606. *Permit may be granted.*— The board of public improvements is hereby authorized, upon the filing of the application and plat required by the preceding section, to grant a permit for such occupancy of the streets, alleys and public places herein named, with such restrictions, regulations and qualifications as may be prescribed by said board and under the supervision and to the satisfaction of the supervisor of city lighting. (Revised Ordinance 1887 Sec. 584, Amended.)

Sec. 607. *Wires, etc., may be placed on telegraph poles, etc., when.* * * *

Sec. 608. *Poles to be placed in alleys, when.* * * *

Sec. 609. *Dimensions, construction and location of poles.* * * *

Sec. 610. *Streets and alleys to be replaced.* * * *

Sec. 611. *Alterations in location of poles, etc., may be ordered.* * * *

Sec. 612. *Privileges conferred, on what conditions.*—No person or persons, corporation or association, shall be entitled to any of the privileges conferred by this article, except upon the following conditions: That said person or persons, corporation or association, before availing himself or itself of any of the rights or privileges granted by this article, shall file with the city register his or its acceptance of all the terms of this article, and agree therein that he or it will file with the comptroller of the city, on the first days of January and July of each year, a statement of his or its gross receipts from his or its business arising from supplying electricity for light or power for the six months next preceding such statement, which shall be sworn to by such person or persons, or the president or secretary of such corporation or association; and further agree that he or it will, at the time of filing such statement with the comptroller, pay into the city treasurer two and one-half per cent on the amount of such gross receipts up to the year eighteen hundred ninety, and five per cent on the amount of gross receipts thereafter. And said person or persons, or corporation or association, shall at the time of filing said acceptance, also file with the city register his or its penal bond in the sum of twenty thousand dollars with two or more good and sufficient securities, to be approved by the mayor and council, conditioned that he or it will comply with all the conditions of this article, or any ordinance which may be hereafter passed, regulating the placing of wires, tubes or cables in the streets and alleys for the purposes named therein; that he or it will comply with

all the regulations made by the board of public improvements having reference to the subject embraced in this article or any ordinance herein named; that he or it will make the statements and payments required by the provisions of this section, and will save the city of St. Louis harmless and indemnified from all loss, cost or damage by reason of the exercise of any of the privileges granted by this article or any ordinance which may be hereafter passed relating to the subject-matter of this article. (Revised Ordinance 1887. Sec. 590.)

Sec. 613. *Penalty.* — Any person or persons, corporation or association which, or any president, manager, superintendent or officer in charge of any corporation or association who shall violate or fail to comply with any of the provisions of this article, shall be deemed guilty of a misdemeanor, and upon conviction thereof, be fined not less than fifty dollars, nor more than five hundred dollars. (Revised Ordinance 1887. Sec. 591.)

Sec. 614. *Reservation of rights.* — The city reserves the right to alter, amend or repeal this article at any time. (Revised Ordinance. Sec. 592.)

Admits that relator did not previous to the passage of said Ordinance No. 16,894, accept the provisions of said Article II, Chapter 15, Revised Ordinance, 1887, and that it has never accepted the provisions of said Ordinance No. 16,894, and that it, said relator, has not been authorized by ordinance of the Municipal Assembly of the city of St. Louis to place its wires, tubes or cables under the streets or alleys of said city.

Denies that said ordinances are valid, so far as relator's charter rights are concerned, or that said city had power to adopt or enforce the same, either under paragraph 2 of Section 26 of Article III of the charter of said city, as by respondent alleged, or under any other provision of said charter: and avers,

That by reason of the exemptions contained in Section 8 of said Act of March 2, 1857, relator's charter, as granted and as amended by said Act of March 26, 1868, was and is a contract by the State of Missouri with relator, not subject to alteration, suspension or repeal by the State of Missouri, or by any municipality thereof; that the enforcement against relator of said ordinances would deny to relator its corporate rights and franchises aforesaid and would impair the obligation of said contract of said State

contained in relator's charter as amended, in contravention of Section 15 of Article II of the Constitution of Missouri, 1875, and also of Section 10 of Article I of the Constitution of the United States, each of which constitutional provisions is relied on by relator for the protection of its corporate rights and franchises in this behalf.

That the only condition annexed by relator's charter to the exercise of its right "to establish and lay down in said city all pipes, fixtures or other thing properly required" to carry on relator's said lighting business, is that the same shall be done "with as much dispatch and as little inconvenience to the public as possible."

That in preparing to lay its wires underground, as stated in its petition, and in applying to said Street Commissioner for a permit to make the necessary excavation, relator fulfilled every condition to which it is lawfully subject in that behalf: and that respondent did not refuse such permit to relator on the alleged ground, nor in fact for the reason, that by laying its wires under ground in the manner by it proposed, relator would cause any inconvenience to the public, but expressly and unconditionally refused to permit relator to make any excavation in any street of said city:

That as against this relator, said ordinances above mentioned are not valid enactments, nor constitute any defense to this proceeding,

Because, as relator avers, said provisions are not, so far as relator's rights are concerned, lawful or reasonable regulations of the use of the streets of said city, but were intended to and do prohibit relator from exercising its said charter rights and powers except upon compliance by relator with conditions which the city of St. Louis has not, nor has the Municipal Assembly thereof any lawful right or power to impose on relator in that behalf, including as one of said conditions that relator shall first be duly author-

ized thereto by the Municipal Assembly, thereby impairing the obligation of the contract contained in relator's charter as amended:

Because the enforcement against relator by said city or any officer thereof of the conditions prescribed by said ordinances would not be a lawful or reasonable exercise of the power of said city under its charter to regulate the use of its streets or of the police power of said city, but is an attempt by said city under color of its charter powers to compel relator to enter into the obligations and to pay to said city from time to time the tax of five per cent. upon the gross annual receipts from relator's business prescribed by Section 612, Article II, Chapter 15, of the Revised Ordinance, 1892, above mentioned: forasmuch as it is provided by said Section 612, that no person or persons, corporation or association shall be entitled to any of the privileges conferred by said Article II, Chapter 15, except upon fulfilling the several conditions in said Section 612 prescribed as hereinbefore set forth:

Because among the conditions prescribed by said Section 612, relator would be compelled before availing itself of any of the rights or privileges mentioned in said Article II, Chapter 15, Revised Ordinance, 1892, to file with the City Register its penal bond in the sum of twenty thousand dollars, conditioned that relator will comply with all the conditions of said Article II or with any ordinance which might thereafter be passed, and will comply with all regulations which may be made by the Board of Public Improvements having reference to the subject-matter embraced in said Article II or any ordinance therein named; all which requirements and conditions are a denial of relator's rights under its charter and impair the obligation of the contract contained therein as aforesaid:

Because said Article II, Chapter 15, Revised Ordinance, 1892, purports to authorize the Board of Public Improvements of said city, in granting a permit for the use or occupation of the streets, alleys and public places of said city for the purposes therein mentioned, to prescribe such restrictions, regulations and qualifications as said Board may think fit in respect of the use of said streets, alleys and public places, and requires every person or corpora-

tion obtaining such permit, as a condition of availing itself of the privileges mentioned in said Article II, to agree to comply with all such regulations made by said Board; whereas the power to regulate the use of the streets of said city granted by clause 2, section 26 of Article III of its charter, is granted only to the mayor and Municipal Assembly of said city, to be exercised by ordinance not inconsistent with the constitution or any law of this State, or with said charter, and does not authorize the said Mayor and Municipal Assembly or either of them, by ordinance or otherwise, to delegate to the Board of Public Improvements of said city the power to make regulations for the use of said streets; wherefore relator says that said requirements and said condition are unlawful and void.

And relator says that the several conditions and requirements prescribed in said Article II, Chapter 15, Revised Ordinance, 1892, are not independent of each other, but are so framed as to subject relator, its officers and agents, to the penalties prescribed in section 613 of Revised Ordinance, 1892, unless before placing along, across or under any street of the city of St. Louis any wires such as hereinbefore mentioned, it, said relator, shall not only have obtained authority so to do from the Municipal Assembly of the city of St. Louis, but shall also have filed in the office of the Board of Public Improvements of said city an application therefor such as prescribed in section 605 Revised Ordinance, 1892, and shall have obtained a permit therefor from said Board, under such restrictions, regulations and qualifications as said Board may prescribe, and shall also have filed with the City Register its acceptance of all the terms of said Article II, Chapter 15, and shall therein agree as required by Section 612 Revised Ordinance, 1892, to file with the Comptroller of said city sworn semi-annual statements of its gross receipts from its business and to pay to the City Treasurer a tax of five per cent. upon the amount of such gross receipts, and shall also have filed with the City Register its bond in the sum of twenty thousand dollars, conditioned as prescribed in said Section 612, Revised Ordinance, 1892: all which requirements and conditions are a denial of relator's rights under its charter

and impair the obligation of the contract contained therein as aforesaid.

Wherefore relator says that it was not under any legal obligation to apply to the Municipal Assembly of said city for authority, nor to the Board of Public Improvements of said city for a permit, to place its wires underground in any street thereof, and that it was the duty of respondent, as Street Commissioner of St. Louis, under the provisions of Section 568, Article II, Chapter 15 of the Revised Ordinance 1887, of said City of St. Louis, to issue to relator a permit for an excavation such as applied for by relator.

Relator denies that either on the 26th of March, 1868, or on the 2nd of March, 1857, lighting by electricity was wholly unknown to art. On the contrary, relator avers that long before either of said dates electricity had been used for illuminating purposes, and apparatus had been devised and publicly exhibited to great numbers of persons by means of which solid bodies were made incandescent by electric currents so as to produce light which could be and was used for purposes of illumination, substantially as hereinbefore set forth.

Respondent's demurrer to reply.

The demurrer of respondent Murphy to said reply,[1] adopted as its own by the City of St. Louis,[2] was on the following grounds:

Generally, because said reply does not state facts sufficient to constitute a defense to respondent's return.

Specially to that portion of said reply beginning with the words "that it, said relator, is advised," and ending with "or any part thereof,"

1. Because said matters are mere conclusions of law.

[1] Id., p. 58. [2] Id., pp. 60–1.

2. Because said matters do not show any right or power in relator to have or ask the rights prayed for in this proceeding.

3. Because said matters show on their face that relator's charter had expired prior to the institution of this proceeding, and therefore relator has no standing in court and no right to engage in business at all.

Specially to that part of relator's reply beginning with the words "Relator is advised and avers that even if the averment in respondent's return," and ending with "entirely avoided by placing said wires in said conduits,"

1. Because it appears therefrom that relator has no power to manufacture or vend electricity.

2. Because it appears therefrom that electricity may be used for producing light and may be used in place of or as a substitute for gas light, but it further appears that relator never had any power to manufacture or use the same.

3. Because it appears affirmatively from said reply that electricity is not a substance or material, and relator has no right to manufacture and vend the same.

Specially, to that portion of said reply beginning with the words "relator admits that by Art. 2, Chap. 15, Rev. Ord. of the City of St. Louis, 1887," and ending with "as applied for by relator"—

1. Because it affirmatively appears from such allegations of relator's reply that relator is subject to the police regulations contained in said ordinance provisions:

2. Because said ordinance provisions do not in any manner impair the obligation of any contract relator may have or at any time may have had, but they are valid regulations in any event.

Specially, to that part of relator's reply beginning with "relator denies that either on the 26th of March, 1868," and ending with "substantially as hereinbefore set forth"—

1. Because relator never having had the right to manufacture or vend electricity, it is not material to it or to this controversy whether or not electricity was known to art on the 2nd of March, 1857, or on the 26th of March, 1868.

2. Because the Act of 1868 did not confer any more power on relator in respect to lighting by electricity than was conferred by the Act of 1857, and relator is not entitled to the benefit of anything which became known to art in this respect between March 2, 1857, and March 26, 1868.

Said demurrer was filed by respondent Murphy on June 29, 1895.[1] On July 1, 1895, the city of St. Louis by consent and leave, entered its appearance and adopted said demurrer as its own: and on July 2, 1895, without further argument, it was by the Court ordered and adjudged[2] —

"That the demurrer of respondents Murphy and the city of St. Louis to the reply of relator be sustained for the reasons given in the opinion heretofore rendered in this cause, to which reference is hereby made as part of this judgment."

Opinion of the Court.

Omitting the abstract of relator's petition therein contained, said opinion was as follows:[3]

* * * * * * * * * * *

Respondent made return to said writ, and by affirmative averments put in issue the rights claimed by relator, and set up the provisions of certain city ordinances regulating the use of electric wires on the streets of the city, and averred a non-compliance with the requirements of such ordinances. By demurrer to parts of the return and motion to strike out other parts the following issues of law were fairly framed:

First. Is the act of March 26, 1868, unconstitutional as

[1] Id., p. 58. [2] Id., p. 61. [3] Id. p. 40.

being in conflict with section 2, article 8, of the Constitution of Missouri of 1865?

Second. Is said act void as being in conflict with section 25, article 4, of said Constitution?

Third. Did the charter of relator expire by limitation at the end of thirty years from the date of the act of March 2nd, 1857?

Fourth. Do the powers granted relator include the right to manufacture, sell or distribute electricity for lighting purposes?

Fifth. Has relator the right, under its charter, to place its wires underground without the assent of the municipal authorities and without compliance with the requirements of the valid ordinances of the city?

I. The object to be accomplished by the writ is to require Murphy as Street Commissioner of the city of St. Louis, to issue to relator a permit to make such excavations on one of the public streets of the city as may be necessary for the purpose of laying its electric wires underground. The constitutionality of the acts under which relator claims corporate existence is put in issue by the answer of respondent and demurrer thereto. Respondent also charges that, though the acts of incorporation were valid, in the first instance, the life of the corporation itself has expired by limitation of its existence, as fixed by the charter and general laws of the State.

The city is not made a party to this proceeding, and we do not deem it necessary in this case to pass upon any questions that do not directly concern the duties of the Street Commissioner. We will not therefore consider, or express an opinion upon, any question involving the right of relator to exercise the rights, or enjoy the franchises which appear to have been granted under the Acts of the General Assembly mentioned in the statement.

For the purpose of discussing the other questions involved we will then assume, without deciding, or intimating an opinion, that relator is an existing corporation, possessing all the powers, rights and privileges its charter purports to confer upon it.

It is insisted by relator that, under its charter, it acquired from the State a vested right to the use of the streets of

the city of St. Louis, under which to lay its pipes for the transmission of gas, or any other "substance or material" that might thereafter be adopted for illuminating purposes, and that such right was beyond the control of the municipal authority; that electricity is a substance and material within the meaning of the charter, and therefore it has a vested right to lay its wires beneath the surface of the streets for the purpose of conducting electricity through the city for illuminating purposes, and that this right can not be interfered with unreasonably by the city.

With the views we take of this question we do not think it necessary to inquire whether the right to use electricity for making light was included under the terms "substance or material" as used in the charter. It appears that relator has, for a number of years, under contracts with the city, been lighting its streets by electricity, conducted by wires strung above the surface of the streets, and other questions besides the abstract right to do so would be involved in such inquiry. We will therefore confine our inquiry to the question whether relator has a vested right to place its electric wires under the surface of the streets without the assent of the municipal authorities thereof, and without compliance with valid ordinances of the city.

Generally speaking, it is true, the legislature has supreme control of the streets of cities. It is also true that it may, and generally does, delegate to municipal corporations such measure thereof as it deems best. The control thus delegated may be exercised by the municipal authorities.

Subsequent to the act of 1868, under authority of the Constitution of 1875, the city of St. Louis adopted a charter whereby the State delegated to it the power to regulate the use of its streets, and the power to pass all ordinances, not inconsistent with the provisions of the charter or the laws of the State, as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce and manufactures.

In pursuance of these powers the city enacted certain ordinances regulating and restricting the use of electric wires in the city and requiring the assent of the Board of Public Improvements in respect to the manner in which electric wires, tubes and cables should be secured or sup-

ported and insulated. It is charged in the return, and admitted by the demurrer, that relator had never complied with the requirement of this ordinance. Relator insists that the provisions of the ordinance can not apply to rights secured to it by the State long prior to the date of the charter.

It is the well-settled present policy of the law of this State to delegate to municipal corporations not only general police powers, but the control of their streets in respect to the use thereof for public purposes other than that of ordinary travel by pedestrians and private vehicles. Thus the Constitution prohibits the Legislature from granting the right to construct and operate street railways within any town or village without first acquiring the consent of the local authorities having control of the streets (Sec. 20, Art. 12, Const. of Mo.).

Again the statute requires telegraph and telephone companies to obtain the consent of the city, through its municipal authorities, before they can exercise the right to lay their wires, and other fixtures, underground in any of its streets (R. S. 1889, sec. 2721).

Electric wires, when charged, are recognized as being dangerous to life and property, and their use is therefore subject to police regulations (W. U. Telegraph Co. *v.* Philadelphia, 21 Am. and Eng. Corp. Cas. 40 and note; Dill. Munic. Corp., sec. 698).

The State can not limit its exercise of the police power by contract or in any other way. It was said by Chief Justice Waite: "All agree that the legislature cannot bargain away the police power of the State. Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police. Stone *v.* Mississippi, 101 U. S., 817; see Boyd *v.* Alabama, 94 U. S., 645; Metropolitan Bd. *v.* Barrie, 34 N. Y., 657; Railroad *v.* Mayor of Balt., 77 Md., 381."

Dillon says: "The citizen owns his property absolutely, it is true; it cannot be taken from him for any private use whatever, without his consent, nor can it be taken for any

public use, without compensation; still he owns it subject to this restriction, namely, that it must be so used as not to unreasonably injure others, and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors, or the citizens generally. Dill., Munic. Corp.

The grant by the State to relator, though construed to include the right to use electricity for illuminating purposes, in respect to such right was taken subject to reasonable regulations as to its use, and the power to regulate has been delegated to the city of St. Louis.

Under its general police power the city has the right to require compliance with reasonable regulations as a condition to using its streets by electric wires.

II. But this is not the only reason why the city should not, under its special power to regulate the use of its streets, and under its general police power, have the right to supervise and regulate the manner in which electric wires of relator and all others should be placed and used in the public streets.

The art of producing light by electricity was wholly unknown to science at the time the franchise was granted to relator. The Legislature, having no knowledge of the use that would be made of streets in applying new discoveries in producing light, could not have intended to grant rights and powers inconsistent with their ordinary use. It would be most unwarrantable to imply, not only that relator had the right under the general words used in the act of incorporation to use electricity for lighting purposes, but that it also had the right to adopt its own methods for exercising that power, regardless of the paramount rights of the public to the use of the streets.

The powers delegated to the city to regulate the use of its streets existed before the art of lighting by electricity was known, or at least before relator adopted it, and the art should be exercised, if at all, under the powers thus in force when it was brought into use.

The following declaration of law was quoted approvingly in Carroll *v.* Campbell (108 Mo., 559): "It is a well-settled rule of construction of grants by the Legislature to corporations, whether public or private, that only such

powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the object of the grant. Any ambiguity or doubt arising out of the terms used by the Legislature must be resolved in favor of the public." Fanning *v.* Gregoire, 16 How., 534.

There seems to me much stronger reason for applying this rule to the manner in which a right conferred shall be exercised when more than one method is open, and when the rights and safety of the public are more or less affected by either. In such case, where the public streets of a city, which are under municipal control, are to be used, it seems too plain for argument that the city should have the right to direct the manner in which the use should be exercised.

Again, it is a matter of common knowledge that electricity is used for the purposes of transmitting sound by telephone, for transmitting messages by telegraph, for generating light, and for producing power. These uses are regarded as public, and have become necessary to the business and convenience of the country, and particularly that transacted in large cities. Overhead electric wires in some streets are numerous. These contribute very materially to the public convenience and private business, but when not properly supervised and regulated endanger the lives and property of the public. If used, as they generally are, in the public streets, public safety requires that they should be under police regulation and municipal control.

It is a matter also of public notoriety that the question is now being considered whether it would not be necessary, in the interest of public safety, as well as convenience, that these wires should be placed under ground, so as thereby to leave the streets safe and unobstructed.

As a police regulation, we have no doubt the municipal authorities would have a right to require this to be done, in case no vested rights were infringed. Many corporations and companies doubtless now use electric wires for the various purposes above mentioned. It cannot be said, not having the various charters before us, that one of these

possesses rights superior to those of any others. To accommodate them all, to prevent monopolies, and to regulate the use of the streets, it seems absolutely necessary that the municipal authorities should have the right to direct the manner in which wires shall be placed under ground. Without such regulations, relator, or any other corporation using electric wires, could place them under ground in such a manner as to practically exclude all others. Moreover, relator, as one of its important franchises, asserts the power to sell, lease or dispose of any portion of said rights, privileges and franchises to individuals, associations or corporations, intending or desiring to exercise the same within any portion of the limits named. Thus, under its charter allowing the rights herein claimed, it could practically control the use of the streets in respect to laying electric wires under ground, and exclude the city from one of the most important of its municipal powers. The Legislature could never have contemplated such a result.

By giving the city the right to regulate the laying of electric wires under ground, relator is deprived of no vested right. If its charter gives it the right to use electricity for lighting purposes it can do so, as we understand from the petition it has been doing, in the method now in use in said city. If the city should determine that public safety requires these wires to be placed under ground, and provides the manner in which it shall be done, and relator believes its rights are thereby infringed, it will then be time enough to complain.

As the case is now presented we must hold that the city, under its power to regulate the use of streets, and under its general police power, has the right to require a compliance with regulations which either wholly prohibit relator from laying its wires under the streets or which regulate the manner in which it may be done.

Respondent under his official duties as Street Commissioner, properly refused to grant the permit demanded unless relator first complied with the requirements of the valid ordinances then in force.

Peremptory writ denied. All the Judges concur.

Errors assigned.

The errors in respect of which this writ was sued out are assigned as follows[1] —:

That the Supreme Court of Missouri erred —

In overruling relator's demurrer to respondent's return; and in overruling relator's motion to strike out portions of said return:

In sustaining respondent's demurrer to relator's traverse and reply to respondent's return; and in entering final judgment for respondents on the pleadings in this cause, denying to relator the writ of mandamus prayed for.

In deciding that the ordinance of the city of St. Louis pleaded in part by respondents, but which is fully set out in relator's reply, is a valid ordinance and binding upon relator; and that said ordinance does not impair the obligation of a contract between relator and the State of Missouri, and does not impair the vested rights of relator under its charter and the franchises granted to it by the State of Missouri prior to the enactment of said city ordinance:

In deciding that said ordinance of the city of St. Louis was a lawful exercise of the police power, and binding as such on relator, and that relator was subject to all the provisions and requirements of said city ordinance in the conduct of its business, and was bound to accept the same with all its provisions and conform to all its requirements before using the streets of said city for laying its wires beneath the surface of the streets for the purpose of conducting electricity through the city of St. Louis for illuminating purposes:

In holding that the art of producing light by electricity was wholly unknown to science at the time its charter and franchise were granted to relator.

[1] Id., p. 3.

BRIEF FOR PLAINTIFF IN ERROR.

I.

The court below denied to relator the right claimed by it, of laying its wires under the streets, on the ground that relator had not complied with the conditions prescribed by Article II, Chapter XV of the Revised Ordinance, 1892, of the city of St. Louis;[1] overruling relator's contention that said ordinance was in conflict with and impaired the obligation of relator's charter.

The question whether, as against relator, said ordinance is valid, necessarily involves the further questions presented by respondent's contention as to the existence, the validity and the proper construction of relator's charter. This court has jurisdiction to determine all said questions in this cause.

Scott *v.* McNeal, 154 U. S. 34, 45;
Mobile & Ohio R. R. Co. *v.* Tennessee, 153 U. S. 486, 492–5;
Bryan *v.* Board of Education, 151 U. S. 639, 650;
Huntington *v.* Attrill, 146 U. S. 658, 684;
New Orleans Water Works Co. *v.* Louisiana Sugar Co., 126 U. S. 18, 38;
Louisville Gas Co. *v.* Citizens Gas Light Co., 115 U. S. 683.

[1] *Supra*, p. 35.

II.

The amendatory Act of March 26, 1868, is not void as contravening Section 2 of Article VIII of the Missouri Constitution of 1865; nor was said Act an act reviving or re-enacting the Act of March 2, 1857, as by respondents contended.

Mo. Const. 1865, VIII, 2: G. S. 1865, p. 39;
State *ex rel. v.* C. G. & R. R. 48 Mo. 471;
State *ex rel.* Maggard *v.* Pond, 93 Mo. 606, 618–19;
Lynch *v.* Murphy, 119 Mo. 163, 174;
Giozza *v.* Tiernan, 148 U. S. 661;
St. Jo, etc., R. R. Co. *v.* Shambaugh, 106 Mo. 557, 568;
1 Rev. Stat. Mo. 1855, p. 371 (General Corporation Law), Ch. 34, Art. I, Sec. 6.

III.

Said amendatory Act of March 26, 1868, is not void as in conflict with Section 25 of Article IV of the Missouri Constitution of 1865, as by respondents alleged.[1] Said act is not an act *reviving* or *re-enacting* the Act of March 2, 1857, but is and purports to be an act to *amend* said last mentioned act, which under the Constitution of 1865, was within the power of the legislature: nor does it purport to revive or re-enact any act by mere reference to the title thereof. Nor does said Act of March 26, 1868, amend or purport to amend said Act of March 2, 1857, "*by providing* that designated words shall be struck out, or that designated words shall be struck out, and others inserted in lieu thereof." Said Act sets forth the part of act amended in

[1] *Supra*, p. 12.

the manner required by said Section 25, ArticleIV, of the Missouri Constitution of 1865, and is in all respects valid and in force.

State *ex rel. v.* Cape Girardeau, &c., R. R. Co., 48 Mo. 468, 471, affirmed in
St. Jo &c. R. R. Co. *v.* Shambaugh, 106 Mo. 569.

See the following Missouri statutes, prior to 1865:

Act of March 14, 1859 (Acts of 1858–9, p. 438);
" " March 20, 1860 (Acts of 1859–60, called session, p. 5);
" " January 16, 1860 (Acts of 1859–60, p. 526);
" " February 15, 1864 (Acts of 1863–4, p. 28);
" " February 13, 1864 (Acts of 1863–4, p. 110);
" " February 5, 1864 (Acts of 1863–4, p. 279);
" " November 23, 1863 (Acts of 1863–4, p. 112);
Cooley Const. Lim. (5th ed.), p. 68 (*56–7);
Mayor of Booneville *v.* Trigg, 46 Mo. 288, 289;
State *ex rel. v.* Draper, 47 Mo. 29;
State *v.* Geiger, 65 Mo. 306, 312;
State *v.* Chambers, 70 Mo. 625, 628;
Morrison *v.* St Louis, I. M. & S. R'y Co., 96 Mo. 602, 606;
State *ex rel. v.* Miller, 100 Mo. 439, 446;
State *v.* Bennett, 102 Mo. 356, 362–4;
St. Jo, &c., R'y Co. *v.* Shambaugh, 106 Mo. 557, 565, 568;
People *v.* Mahaney, 13 Mich. 496–7.

IV.

Relator's charter did not expire on March 2, 1887. The amendatory Act of March 26, 1868,[1] granted to relator " to

[1] *Supra*, p. 7.

have, hold and enjoy *forever*, all the rights, privileges and franchises granted to it by" said Act of March 2, 1857, as enlarged by said amendatory Act; and in virtue thereof relator now holds its franchises.

But even if said Act of March 26, 1868, were void, as by respondents alleged, relator's charter, under the provisions of Section 6 of the Act of March 2, 1857, would have been extended for thirty years from March 2, 1887; since relator's reply avers,[1] and respondents' demurrer admits, that relator was duly organized as a corporation in 1857, within one year from the time said Act took effect, and that the City of St. Louis has at no time purchased or offered to purchase the property and effects of said corporation or any part thereof.

Act of March 2, 1857, Sections 6: 9.[2]
State ex rel. Walker (Attorney-General) *v.* Payne, 31 S. W. Rep. 799.
St. Louis *v.* St. Louis Gas Light Co., 70 Mo. 119-20.

V.

The validity of relator's charter, to wit, of said Act of March 2, 1857, as amended by said Act of March 26, 1868, has already been three times affirmed by the Supreme Court of Missouri. The latest of said decisions was in a proceeding by mandamus instituted in October, 1890, by the city of St. Louis, respondent here, in the name of the State, to compel relator to reduce the price of gas, in conformity with an ordinance of said city enacted in March, 1890. Relator's plea that its charter was an irrepealable contract by the State of Missouri, under which its right to fix the price of gas sold by it could not be impaired by

[1] *Supra*, pp. 17, 18.

[2] *Supra*, pp. 5-6.

either State or municipal legislation, was sustained on demurrer by said court and the writ denied. The validity and perpetual duration of relator's charter rights under said Act of March 2, 1857, as amended by said Act of March 26, 1868, are therefore *res judicatæ*.

St. Louis *v.* St. Louis Gas Light Co., 70 Mo. 69, 115, 119–20, 120–2;
St. Louis Gas Light Co. *v.* St. Louis, 86 Mo. 495, 499;
State *ex rel.* City of St. Louis *v.* Laclede Gas Light Co., 102 Mo. 472, 484–6;
Chouteau *v.* Gibson, 76 Mo. 47.

VI.

The grant by the State to relator includes the right to use electricity for illuminating purposes.

1. Said charter expressly grants to said corporation (1) the privilege and right of lighting the City of St. Louis, and (2) the privilege and right of making and vending gas, gaslights, gasfixtures and any substance or material that *may be now or hereafter* used as a substitute therefor, and (3) all other powers necessary to execute and carry out the privileges and powers hereby granted to said company. By such words relator was plainly empowered to adopt any means of producing artificial light which might at any subsequent time become available, whether known or used in 1857 or not.

Act of March 5, 1857, Sec. 5;
Green Bay, &c., R. R. Co., *v.* Union Steamboat Co., 107 U. S. 98, 100, affirmed in
Ft. Worth City Co. *v.* Smith Bridge Co., 151 U. S. 294, 301;

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Ft. Worth City Co. *v.* Smith Bridge Co., 151 U. S. 294, 301;

Callaway M. & M. Co. *v.* Clark, 32 Mo. 305, 308;
Henning *v.* U. S. Ins. Co., 47 Mo. 432;
Ohio Ins. Co. *v.* Merchants' Ins. Co., 11 Humph. 1;
1 Morawetz on Corporations, §§ 320–21;
2 Beach Priv. Corp., § 385;

2. Electricity is a substance, within the meaning of said charter, for years past commonly used as a substitute for gas, in producing electric light as a substitute for gas light. Of this, the Court will take judicial notice; also, that since 1889 the Missouri general corporation law expressly provides for the formation of corporations which "shall have full power to *manufacture* and *sell* and to furnish such *quantities of* gas, *electricity* or water as may be required in the city where located, for public or private buildings or for other purposes," and authorizes any city, town or village to contract with such corporations "for the lighting *by gas or electricity*, or supplying with water the streets," etc, therein.

Carbon is a material which, when made incandescent by electricity in the manner proposed by relator, is commonly used as a substitute for gas made incandescent by heat, for the production of light, within the meaning of said charter: and of this also the Court will take judicial notice. Respondents' demurrer admits that it is relator's purpose, and is practicable, to produce electric light, as a substitute for gas light, by using carbon as a substitute for gas in the manner averred in relator's reply:[1]

Brown *v.* Piper, 91 U. S. 37, followed in
State *v.* Hayes, 78 Mo. 318;
Wolfe *v.* Mo. Pacific R'y Co., 97 Mo. 481–2;
Udderzook *v.* Commonwealth, 76 Pa. St. 340;
Luke *v.* Calhoun County, 52 Ala. 119;

[1] *Supra*, pp. 18–20.

1 Rev. Stat. Mo. 1889, Chap. 42 (General Corporation Law), Art. 8, Secs. 2793–4.
People *ex rel. v.* Wemple, 129 N. Y. 543;
S. C. 38 Am. & E. Corp. Cas., 657;
Commonwealth *v.* N. El. Light & P. Co., 145 Pa. St. 105;
S. C. 38 Am. & E. Corp. Cas., 651.

3. Under such a grant, it is immaterial whether the art of producing light by electricity was known at the date of relator's charter. But relator's reply avers, and respondents' demurrer admits, that it was known at that date, and of this also the Court will take judicial notice.

"The Electric Light, its history," &c., (Alglave and Boulard, Sloane's transl., Appletons, 1884), pp. 21–24;

VII.

The validity of the act of March 2, 1857, incorporating relator, is not questioned. For the purposes of this case, the court below conceded the validity of the amendatory Act of March 26, 1868, and assumed "that relator is an existing corporation, possessing all the rights, powers and privileges its charter purports to confer upon it:" also, that said charter powers included the right to use electricity for making light.[1]

Said charter contains an express and irrepealable grant to relator of the privilege and right of lighting the City of St. Louis, and of making and vending gas, gaslights, gas fixtures and any substance or material that may be now or hereafter used as a substitute therefor; and the further

[1] *Supra*, p. 30–1.

right, "*to that end*, to establish and lay down within the corporate limits of said city, as the same are now or may hereafter be established, all pipes, fixtures or other thing properly required in order to do the same, the same to be done with as much dispatch and as little inconvenience to the public as possible:" no other condition being prescribed.

Construing said charter, the court below held "that the city, under its power to regulate the use of streets, and under its general police power, has the right to require a compliance with regulations which either *wholly prohibit* relator from laying its wires under the streets, or which *regulate the manner* in which it may be done." [1]

These propositions cannot be reconciled. If relator has the right, under its charter, to lay either gas pipes or electric wires under the streets, in order to carry on its business, upon the sole condition that this be done "with as much dispatch and as little inconvenience to the public as possible," and (as admitted by the pleadings) is ready and willing to fulfill that condition, the city cannot, consistently with that charter, either prohibit relator from exercising such right, or annex any other condition thereto.

Act of March 2, 1857, amended by
Act of March 26, 1868, Sec. 1; [2]
State *ex rel. v.* Laclede G. L. Co., 102 Mo. 472, 484–6;
State *ex rel. v.* Greer, 78 Mo. 194–5;
Cooley's Const. Lim., p. 337 (*279): 712 (*577);
N. O. Gas Light Co. *v.* Louisiana Light Co., 115 U. S. 650, citing
State *v.* Cincinnati G. Co., 18 Ohio St. 262;
2 Dillon Mun. Corp. (4th ed.), Sec. 691;
Citizens St. Ry. Co. *v.* Memphis, 53 Fed. R. 732;
Home of the Friendless *v.* Rowse, 8 Wallace, 430;
St. Anna's Asylum *v.* New Orleans, 105 U. S. 362.

[1] *Supra*, p. 35.

[2] *Supra*, p. 4–7.

VIII.

Said city ordinance is not a valid exercise, as against relator, of the city's charter power to regulate the use of streets. Paragraph 2, section 26, article III of the City Charter (relied on for respondents) requires that power to be exercised by ordinance duly enacted by the Mayor and Municipal Assembly. But said ordinance does not contain, but only authorizes the Board of Public Improvements to prescribe, regulations as to the placing and securing of underground wires. It is not averred or shown by respondents that said Board have prescribed any regulations on that subject: but even if the city had power, under its charter, to regulate or control the exercise of relator's charter rights, it cannot delegate that power to the Board of Public Improvements.

Ruggles *v.* Collier, 43 Mo. 353;
St. Louis *v.* Clemens, 43 Mo. 395;
Sheehan *v.* Gleason, 46 Mo. 103;
Thompson *v.* Booneville, 61 Mo. 282;
Matthews *v.* Alexandria, 68 Mo. 116, 119;
St. Louis *v.* Russell, 116 Mo. 248, 255–7;
City of Nevada *v.* Eddy, 119 Mo. 557–8;
Birdsall *v.* Clark, 73 N. Y. 73, 76–7;
Thompson *v.* Schermerhorn, 6 N. Y. 92, 96;
Anderson *v.* Equitable Gas Light Co., 12 Daly, 462;
1 Beach on Pub. Corp'ns., § 558.
Re Quong Woo, 13 Fed. Rep. 229;
1 Dillon Mun. Corp. (4th ed.), Sec. 96 (p. 154), and cases cited.

IX.

Said ordinance is also void, as against relator, because, under color of the charter power of the city, by ordinance,

to regulate the use of streets, it absolutely prohibits the exercise by relator of charter rights essential to the conduct of its business, and expressly granted to that end, except at the arbitrary will of the Municipal Assembly, and then only on condition that relator shall first comply with each and all of the conditions of said ordinance, including the payment of a tax and the execution by relator of a penal bond and agreement, amounting to the express relinquishment by relator of valuable corporate franchises so granted to it.

The power of the city, under Paragraph 2, Section 26, Article III of its charter, to regulate the use of streets, relied on by respondents, does not include such denial to relator of its rights under an irrepealable charter.

Brennan *v.* Titusville, 153 U. S. 289, 300;
N. O. Gas Light Co. *v.* Louisiana, &c., Co., 115 U.S. 650;
St. Louis *v.* W. U. Tel. Co., 148 U. S. 92–103;
S. C. 149 U. S. 465, 470–1;
State ex rel. City of St. Louis *v.* Laclede Gas Light Co., 102 Mo. 472, 484–6;
Citizens' St. Ry. Co. *v.* Memphis, 53 Fed. R. 715, 732;
Toledo, &c. R. R. *v.* Jacksonville, 67 Ills. 37, 40–42;
Mayor, &c., *v.* Second Av. R. R., 32 N. Y. 261, 273–4;
St. Paul *v.* Traeger, 25 Minn. 248;
Tiedeman Lim. of Police Power, § 101, pp. 280, 281.

X.

The city ordinance in question, as against said charter rights of relator, is not valid as a police regulation. Relator's petition avers, and respondent's pleadings admit, that relator is ready to lay its wires with as much dispatch

and as little inconvenience to the public as possible, and in the manner particularly described in relator's reply; which is not averred or shown to be inconvenient or detrimental to the public, and which (as admitted by said demurrer) will not obstruct the use of the streets, while avoiding dangers hitherto existing.[1]

Under such circumstances, the police power cannot be invoked; *a fortiori*, when the enforcement of said ordinance, under color of police regulations, would deprive relator of essential rights and privileges granted by an irrepealable charter.

Gulf, &c., Railway *v.* Hefley, 158 U. S. 104–5;
N. O. Gas Light Co. *v.* Louisiana Light Co., 115 U. S. 650, 661;
N. O. Water Works Co. *v.* Rivers, 115 U. S. 674;
Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S. 683;
Mugler *v.* Kansas, 123 U. S. 623;
Brennan *v.* Titusville, 153 U. S. 300;
H. & St. Jo Railroad Co. *v.* Husen, 95 U. S. 472–4.
State *ex rel.* City of St. Louis *v.* Laclede Gas Light Co., 102 Mo. 472, 484–6;
State ex rel *v.* Corrigan St. Ry. Co., 85 Mo. 263, 282;
City of Kansas *v.* Corrigan, 86 Mo. 67, 70;
Sloan *v.* Pacific Railroad, 61 Mo. 31–2;
State *ex rel. v.* Greer, 78 Mo. 194–5;
Toledo, &c., R. R. *v.* Jacksonville, 67 Ills. 37, 40.
People *v.* Jackson P. L. Co., 9 Mich. 307;
Citizens' St. Ry. Co. *v.* Memphis, 53 Fed. R. 715, 732;
Cooley's Constitutional Limitations (5th ed.), pp. 706: 712–13;
Tiedeman on Police Power, Secs. 191: 194, Note 1;

[1] *Supra*, p. 20.

1 Hare's American Constitutional Law, p. 618;
2 Beach on Public Corporations, §§ 1229, 1249.

XI.

1. Under the city charter of St. Louis, the Street Commissioner is charged with the control, repair, etc., of the streets, and by city ordinance it is provided that no person shall make any excavation on any public street without written permission of the Street Commissioner.

2. Relator having applied to the Street Commissioner for such permit, in pursuance of its charter rights, it was his duty to grant it; which being refused, *mandamus* is the proper remedy.

St. Louis Charter, Article IV, Sec. 35 (II Rev. Stat. Mo., 1889, p. 2109);
Rev. Ord. St. Louis (1887), Art. I, Chap. 15, Sec. 568;[1]
High, Extr. Legal Remedies, Sec. 324;
1 Dillon Mun. Corp., §§ 827–8;
State ex rel. *v.* State Board of Health, 103 Mo. 29;
State ex rel. *v.* Tracy, 94 Mo. 217, 224–5.

[1] *Supra*, p. 9.

ARGUMENT FOR PLAINTIFF IN ERROR.

I.

QUESTIONS INVOLVED: JURISDICTION.

The federal question presented by this record is,—

Whether the city ordinance which was held valid by the Supreme Court of Missouri impairs the obligation of the contract contained in the charter of relator, plaintiff in error?

The decision of this question by this Court necessarily involves the further questions presented by the record as to the existence, validity and proper construction of said charter. This Court has jurisdiction to determine all said questions in this cause.

The opinion of the court below[1] is made part of the record in this cause, not only by the terms of the final judgment therein,[2] but by Section 3 of the amendments to the Missouri Constitution, adopted November, 1890, by which the Supreme Court was reorganized upon its present basis.[3]

The record shows that relator claimed the right, under its charter, granted by the State of Missouri in 1857, as

[1] *Supra*, pp. 29–35.
[2] Printed Record, p. 61.
[3] Mo. Session Acts, 1889, p. 322, Sec. 3.

amended in 1868, to carry on the business of lighting the City of St. Louis by electricity; and to that end, to lay under the streets of said city suitable pipes or conduits for the electric wires properly required therefor.[1] Respondents, the City of St. Louis and its Street Commissioner, denied that right on the ground, *inter alia*, that relator had not complied with a city ordinance, enacted after 1868, prohibiting any corporation to lay such wires underground unless authorized by the Municipal Assembly, and then only upon compliance by such corporation with certain conditions therein prescribed.[2] To this relator replied that the enforcement of said ordinance would be a denial of its rights under said charter, and an impairment of the obligation of the contract of the State of Missouri contained therein.[3] The court below held said ordinance valid, and on that ground alone denied to relator the right so claimed by it.[4] Thus, by the judgment below, was drawn in question the validity of a city ordinance enacted under the authority of the State of Missouri, on the ground of its repugnance to Section 10 of Article I of the Constitution of the United States, prohibiting any State from passing a law impairing the obligation of a contract; and the decision was in favor of its validity.

That this Court has jurisdiction, on that ground, under U. S. Rev. Stat., Sec. 709, to re-examine said judgment, is not denied, and is beyond any doubt.

But respondent below denied relator's right to relief on the further grounds (1) that the Act of 1868, amending its charter, was unconstitutional and void, (2) that said charter expired in 1887, and (3) that under said charter relator was not empowered to make, sell or distribute electricity for lighting purposes. Including these, the

[1] *Supra*, p. 10.
[2] *Supra*, pp. 13–14.
[3] *Supra*, pp. 23–27.
[4] Opinion, *supra*, p. 35.

questions presented by the record were thus stated by the court below: [1]—

First. Is the Act of March 26, 1868, unconstitutional, as being in conflict with Section 2, Article 8 of the Constitution of 1865?

Second. Is said Act void as being in conflict with Section 25 of Article 4 of said constitution?

Third. Did the charter of relator expire by limitation at the end of thirty years from the date of the Act of March 2, 1857?

Fourth. Do the powers granted relator include the right to manufacture, sell or distribute electricity for lighting purposes?

Fifth. Has relator the right, under its charter, to place its wires under ground without the assent of the municipal authorities and without compliance with the requirements of the valid ordinances of the city?

It is manifest that the enforcement of said ordinance cannot impair the obligation of a contract by the State of Missouri with relator if no such contract exists, or if, upon a proper construction of said charter, relator never possessed the right denied to it by the court below. The decision by this Court, therefore, of the federal question above stated, necessarily involves the decision of the remaining questions. This Court has repeatedly affirmed its jurisdiction, independently of the State court, to decide for itself all such questions.

In *Mobile & Ohio R. R. Co.* v. *Tennessee*, 153 U. S. 492–3, this Court said:—

"It is well settled that the decision of a State court

[1] *Supra*, pp. 29–30.

holding that, as a matter of construction, a particular charter or a charter provision does not constitute a contract, is not binding on this court. The question of the existence or non-existence of a contract in cases like the present is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a State, by its terms or necessary operation, gives effect to some provisions of the State law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the State law complained of impairs its obligation." (Id., p. 495.) "The grounds upon which the Supreme Court of the State held that the contract, claimed by the railroad company under the eleventh section of its charter, was invalid, in no way affects the jurisdiction of this court. The legal existence of the contract itself, and its proper construction, is necessarily involved in the question of the alleged impairment of the obligation thereof."

So, in *Huntington* v. *Attrill*, 146 U. S. 684, it was said: —

"The case, in this regard, is analogous to one arising under the clause of the Constitution which forbids a State to pass any law impairing the obligation of contracts, in which, if the highest court of a State decides nothing but the original construction and obligation of a contract, this court has no jurisdiction to review its decision; but if the State court gives effect to a subsequent law, which is impugned as impairing the obligation of a contract, this court has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is. *New Orleans Water Works* v. *Louisiana Sugar Co.*, 125 U. S. 18, 38."

In *Scott* v. *McNeal*, 154 U. S. 45, the ruling above quoted was cited and affirmed.

So, in *Bryan* v. *Board of Education*, 151 U. S. 650, the Court said: —

"Did the [subsequent] act thus interpreted, impair the

obligation of any contract that the plaintiffs in error had in reference to that college? It certainly did, if the alleged contract forbade the removal of the Institute from Millersburg, except with the assent of the plaintiffs and those in whose behalf they sue. So that it is necessary to inquire as to the existence and effect of the alleged contract. And that question must be determined by this court upon its own judgment, independently of any adjudication by the State court. *Jefferson Bank* v. *Skelly*, 1 Black, 436, 443; *Wright* v. *Nagel*, 101 U. S. 791, 794; *Louisville & Nashville Railroad Company* v. *Palmes*, 109 U. S. 244, 254, 257; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683, 697; *Vicksburg, &c., Railroad Co.* v. *Dennis*, 116 U. S. 665, 667. If there was no such contract as is alleged, then no right, secured by the National Constitution, has been denied by the decree below."

The court below decided only that said ordinance was valid, and "assumed, without deciding," that relator is "an existing corporation, possessing all the powers, rights and privileges its charter purports to confer upon it; this for the following reasons stated in its opinion:[1] —

"The city is not made a party to this proceeding, and we do not deem it necessary in this case to pass upon any questions that do not directly concern the duties of the Street Commissioner. We will not therefore consider, or express an opinion upon, any question involving the right of relator to exercise the rights, or enjoy the franchises which appear to have been granted under the Acts of the General Assembly mentioned in the statement."

That opinion was filed when the court below overruled relator's demurrer to and motion to strike out parts of the return to the alternative writ, made by the Street Commissioner, then sole respondent.[2] Relator then filed its reply, putting in issue the several averments in the return, setting out said ordinance in full, which was only in part set

[1] *Supra*, p. 30.

[2] *Supra*, pp. 2: 11.

out in said return[1] and raising, by express averment, the federal question above stated. To this reply the respondent, Murphy, demurred: after which, the City of St. Louis, by consent and leave, was made a party to the suit, adopting as its own said return and demurrer; all parties desiring a decision upon all said questions. The court below, however, without further argument, sustained said joint demurer, "for the reasons given in the opinion heretofore rendered in this cause, to which reference is hereby made as part of this judgment."[2] In other words, the court below still assumed, without passing upon it, the existence and validity of the contract with the State of Missouri relied on by relator, deciding only that the obligation of such contract was not impaired by the ordinance complained of.

But since, as this court holds,[3]— "If there was no such contract as is alleged, then no right secured by the National Constitution has been denied by the judgment below"— the existence, validity and true construction of relator's charter must first be determined by this Court.

II.

VALIDITY OF RELATOR'S CHARTER.

The amendatory Act of March 26, 1868, is not void as contravening Section 2 of Article VIII. of the Missouri Constitution of 1865, nor was said Act an act reviving or re-enacting the Act of March 2, 1857, as by respondent contended.

As will presently appear, the Supreme Court of Missouri, in a proceeding instituted by the City of St. Louis

[1] *Supra*, p. 15.
[2] *Supra*, p. 3: Pr. Rec., p. 61.
[3] Bryan *v.* Board of Education, *supra*.

against this plaintiff *in October, 1890*, directly adjudged the Act of March 26, 1868, and plaintiff's charter as amended thereby, to be valid and in force at that date, and cited with approval two previous decisions to the same effect. Plaintiff in error therefore contends that this question is *res judicata*. But since respondents' contention against its validity will doubtless be renewed in this Court, on the grounds urged below, these will first be considered.

It will be observed that the validity of the Act of March 2, 1857, is not questioned. Respondents' return admits that by said Act relator became a body corporate.[1] The Missouri Constitution in force at that date was that of 1845, which contained only two restrictions upon the power of the General Assembly to enact laws, both relating to slavery;[2] which was therefore subject to no other restriction except those contained in the Constitution of the United States.[3] In *Home of the Friendless* v. *Rowse*,[4] this Court held valid and irrepealable a charter granted under it, perpetually exempting from all taxation a private corporation created thereby. The Act of March 2, 1857, being in terms a present grant of corporate powers, without any condition precedent, the corporation came into being upon the acceptance of the charter by the organization which was effected in 1857, as admitted by respondents' demurrer.[5] Respondents' sole contention as to this Act was, that by the terms of Section 9 thereof, the corporate rights thereby granted expired on March 2, 1887;[6] which will be presently considered. But the Act of March 26, 1868, was

[1] *Supra*, p. 11: Pr. Rec., p. 24.

[2] Mo. Const. 1845, Art. 3, Sec. 26: R. S. Mo. 1845, pp. 32–3.

[3] Giozza *v.* Tiernan, 148 U. S. 661.

[4] 8 Wallace, 430, affirmed in *St. Anna's Asylum* v. *New Orleans*, 105 U. S. 362.

[5] St. Joseph, etc., Ry. Co. *v.* Shambaugh, 106 Mo. 566–7.

[6] *Supra*, p. 12: Pr. Rec., p. 27.

attacked as unconstitutional and void, because in conflict, as alleged, with Section 2, Article VIII, and also with Section 25, Article IV, of the Missouri Constitution of 1865.

Article VIII, Section 2 of the Missouri Constitution of 1865, is in the words following: —

"II. No law shall be passed, *reviving* or *re-enacting* any act heretofore passed, creating any private corporation, where such corporation shall not have been organized and commenced the transaction of its business, within one year from the time such act took effect, or within such other time as may have been prescribed in such act for such organization and commencement of business."

It was averred in respondent's return,[1] —

"Respondent further shows unto the court that the Laclede Gas Light Company did not within one year from the time the Act of March 2nd, 1857, took effect, organize, neither did it commence the transaction of its business within one year after the said Act of March 2nd, 1857, took effect; but on the contrary, said Laclede Gas Light Company did not *commence business* until, to-wit, the year 1873, *and therefore* respondent avers that the Act approved March 26th, 1868, was in conflict with Par. 2, Sec. 1, Art. 8, of the Constitution of 1865; and respondent further avers that said Act of March 26th, 1868, was an Act reviving and re-enacting the Act of March 2nd, 1857."

In reply to this, relator averred[2] that by Section 8 of the Act of March 2, 1857 (its original charter), it was exempted from the operation of Sections 6 and 7 of "An Act concerning corporations," approved November 23, 1855 (being the general corporation law in force in 1857), which were as follows: —

"Sec. 6. If any corporation hereafter created by the legislature shall not organize and commence the transaction

[1] *Supra*, pp. 11-12: Pr. Rec., p. 26.

[2] *Supra*, p. 15.

of its business within one year from the date of its incorporation, its corporate powers shall cease.

Sec. 7. The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal in the discretion of the legislature."

The relator was therefore exempted by the Act incorporating it from the requirement to organize or commence business within one year from the time said Act took effect, and no time was prescribed in said Act for such organization and commencement of business: and being also exempted from the operation of Section 7 of said Act of November 23, 1855, relator's charter became and was an irrepealable contract of the State of Missouri. But it was further averred that relator did completely organize as a corporation, pursuant to its charter, during the year 1857, and did commence business long before the year 1873: which averments were admitted by respondents' demurrer to said reply.

It is perfectly clear, we submit, that the Act of March 26, 1868, cannot be held unconstitutional or void on the ground that it was a law such as described in Section 2 (wrongly designated in said return as Paragraph 2 of Section 1) of Article VIII of the Constitution of 1865, which forbids the legislature to pass any law *such as described in that section*.

It is a fundamental rule, emphasized by numerous decisions of the Supreme Court of Missouri, that in determining whether an Act of the Legislature, enacted in due form, was passed in violation of the Constitution, the courts will always presume such Act to be constitutional and valid until the contrary is shown beyond any doubt.

In *State ex rel.* v. *C. G. &c. R. R. Co.*, 48 Mo. 470–71, that Court said: —

"No rule of construction is better established, both upon

principle and authority, than that Acts of the legislature are to be presumed constitutional until the contrary is clearly shown; and it is only when they manifestly infringe on some provision of the Constitution that they can be declared void for that reason. In cases of doubt, every possible presumption, not directly and clearly inconsistent with the language and subject-matter, is to be made in favor of the constitutionality of the Act."

In the important case of *State ex rel. Maggard* v. *Pond*, 93 Mo. 606, 618–19, in which was upheld in 1887 the constitutionality of the "Local Option Act," that court said: —

"With the policy of the law, the wisdom or want of it in its enactment, we have no concern; that belongs to the domain of the legislature. Our business is to declare what is the law, and not to make laws. When the constitutionality of a law is assailed, before we can assume to declare it void, and thus erase it from the statute books, its invalidity must be made plainly to appear. *Stephens* v. *Bank*, 43 Mo. 390."

In *Lynch* v. *Murphy*, 119 Mo. 163, 174, decided by that Court *in banc* December 23, 1893, upholding against numerous objections the validity of an Act alleged to be unconstitutional, the Supreme Court of Missouri said: —

"In passing upon the constitutionality of the law now under consideration, we must concede to the legislators who enacted it the same sincerity of purpose, the same regard for their oaths to support the constitution of the State, and the same reverence for the constitution that we ourselves have; and unless we are satisfied beyond a reasonable doubt that the law is unconstitutional, it is our duty to uphold it."

And in *Pine Grove* v. *Talcott*, 19 Wallace (86 U. S.), 666, this Court said: —

"It is said the Act is in conflict with the constitution of

the State. It is an axiom in American jurisprudence that a statute is not to be pronounced void upon this ground unless the repugnancy to the constitution be clear and the conclusion that it exists inevitable. Every doubt is to be resolved in support of the enactment."

No law can be held unconstitutional or void on the ground that its passage by the legislature was prohibited by Section 2 of Article VIII of the Constitution of 1865, —

Unless it is a law *reviving* an Act passed before July 4, 1865, or is a law *re-enacting* an Act passed before July 4, 1865;

Nor unless the Act *revived* or *re-enacted* was an Act creating a private corporation;

Nor unless the corporation created by such Act failed to commence the transaction of its business, — either within one year from the time such Act creating it took effect,

or within *such other time as may have been prescribed by such Act* for such organization and commencement of business.

So much is perfectly clear on the face of the constitutional provision.

But the question arises — what is meant by "an Act *reviving* or *re-enacting* an Act" ?

In St. Jo. etc. R. R. Co. v. *Shambaugh*, 106 Mo. 557, 568, decided in 1891, the court below passed directly on that question, upholding the constitutionality of an Act amending a railroad charter, alleged to be invalid under this same section of the constitution of 1865. Said the court (quoting that section): —

"The above constitutional provision is not absolute, that is to say, it does not prohibit the legislature from enacting laws reviving prior acts creating private corporations *in all*

cases. The power to enact such laws remains in the legislature, except in the specified cases. Now the act in question does not on its face show that it comes within the prohibited cases. On its face it is a valid law. The principle of law is too well settled to call forth citation of authorities, that an act of the legislature will be presumed to be constitutional until its unconstitutionality is made to appear. There is nothing in this record to show that this act falls within the prohibited cases. In the first place the prohibition against reviving charters *implies that the charter to be revived is lifeless*. On this record the company was *an existing one* with perpetual succession *at the date of the alleged reviving act*."

It was further held in that case[1] —

" While the Constitution of 1865 prohibited the creation of private corporations by special laws, and contained other restrictions against special legislation, still it was held by this court that the legislature could, by a special act, amend special charters previously enacted. *State ex rel. Circuit Attorney* v. *Railroad*, 48 Mo. 468 " (decided in 1871).

It is not averred, nor was contended by respondents, that the *Act of March 2, 1857*, was " lifeless," or was not in full force, in 1868. On the contrary, their return avers[2] that by the terms of Section 9 thereof, that Act *expired* on March 2, 1887, viz., at the end of the thirty years limited by that section; and is therefore admitted to have been in force until that date.

It follows from the decisions above cited (1) that the section in question did not include or relate to any act not falling within the precise description in said Section 2, Article VIII; also (2) that the prohibition against *reviving* even an act such as therein described, applies only to charters already " lifeless,"— that is, that no law which amends or

[1] 106 Mo., p. 569.

[2] *Supra*, p. 12: Pr. Rec., p. 27.

affects the charter of a private corporation is an act *reviving* that charter, *if at the date of the alleged reviving act such charter was still in force;* also, (3) that since every presumption is made in favor of the validity of a law attacked as unconstitutional, that presumption will prevail unless the record clearly discloses the contrary.

Further light is thrown upon the intent of this constitutional provision by reference to the general law concerning corporations in force when it was adopted.

The constitutional provision under consideration was first adopted in 1865, as Section 2 of a new article (VIII) concerning "Banks and Corporations." Section 4 of that article provided that corporations might be formed under general laws, "but shall not be *created* by special Acts, except for municipal purposes." Before 1865, many hundreds of private corporations had been created by special Acts, many of which had expired by non-user, under Section 6 of the general corporation law above quoted. The manifest purpose of Section 2, Article VIII was to prevent these dead corporations from being resurrected by the passage of laws purporting to *revive* or *re-enact* such "lifeless" charters, thus evading the prohibition in Section 4 against *creating* private corporations by special Acts. That this was the construction placed on Section 2 by this Court in the Shambaugh case, the preceding citation shows.

But it is also evident that in respect of a private corporation whose charter specially exempted it from the operation of Section 6, of the General Corporation Law of November 23, 1855, above quoted, *and prescribed no other time within which such corporation should organize and commence business*, the prohibition in Section 2, Article VIII of the Constitution of 1865 could have no application whatever. Such a charter would not fall within the provisions of said Section 2 as to the time either of organizing or of commencing business; being (1) exempted from the one-year

requirement of the general law, and (2) *no "other time"* being prescribed therein for doing either. Such case is plainly within the ruling of the Supreme Court of Missouri in the *Shambaugh* case, that power to enact a law reviving or re-enacting prior acts creating private corporations still remained in the legislature, *except in the cases specified in Section 2.* The law amending the charter of the St. Jo. & Iowa R'y Co., was therefore held valid, as not within Section 2 of Article VIII of the Constitution of 1865.

In the light of these considerations, we submit that it is perfectly clear that the Act of March 26, 1868, is not "a law *reviving* or *re-enacting*" the Act of March 2, 1857, within the meaning of Section 2, Article VIII of the Constitution of 1865: because,—

1. Said Act of March 26, 1868, does not purport to *revive* or to *re-enact* the Act of March 2, 1857, but purports to be, and plainly is, an Act to *amend* said Act; something essentially different, and which was clearly within the power of the legislature.[1]

2. Said Act of March 2, 1857, was not "lifeless" when the Act of March 26, 1868, was passed, but was in full force. Respondents' return not only concedes this, but avers that it remained in force nineteen years thereafter, and *expired in 1887.*

3. The Act of March 2, 1857, and the corporation created thereby, was expressly exempted, by Section 8 of said Act, from the operation of Section 6 of the General Corporation Law of 1855 above quoted, *and no other time was prescribed in said Act within which said corporation should organize and commence business.*

[1] St. Jo., etc., Ry. Co. *v.* Shambaugh, *supra.*

In the *Shambaugh* case, *supra*, the Supreme Court of Missouri construed the word *reviving*, as used in Section 2, Article VIII, without expressly mentioning or construing the word *re-enacting*. But it is evident that these two words, in that section of the constitution, mean the same thing. If there be any distinction between them, it would be expressed by saying that an Act such as therein mentioned would *re-enact* the former *law* which was no longer in force, and would thereby *revive* the "lifeless *charter;*" but it is clear that both words are used interchangeably in the section, for an Act still in force can no more be *re-enacted* than a charter which has not expired can be *revived*.

Nevertheless, it was contended for respondents below that the Act of March 26, 1868, did *re-enact* the Act of March 2, 1857. To *enact*, it was said, means *to enact again;* and *to enact* (citing Webster's Dictionary) *to make into a law;* therefore, to re-enact means "to do such acts over again." Hence, it was argued —

"The Act of 1868 *re-enacts* the Act of 1857. The Act of 1857, in Sec. 5, conferred rights 'during the continuance of this act,' that is, until 1887. The Act of 1868 undertakes to confer these rights *forever*, *thereby* the Act of 1868 *re-enacts the act of 1857*, creating the Laclede Gas Light Company, and if the act is constitutional, according to relator's contention, extended the life of the corporation from 1887 to an unlimited period of time, and *at the same time extended the rights and franchises*, which, according to the Act of 1857, would have expired in 1887, to an indefinite term. Without the Act of 1868, relator has no legal existence now and no right to any of the franchises claimed. It seems to me, therefore, too clear for argument, that the Act of 1868, *re-enacts* to a most essential and vital degree, the Act of 1857."

But if the word *re-enact* means, as thus contended, "to do such acts over again," it would seem very clear that when the legislature passes an Act purporting to *amend* a former Act, thereby assumed to be in full force, and such amendatory Act makes provisions concerning the subject-matter of the Act amended which are new and entirely different from those contained therein, as by enlarging franchises and repealing provisions contained in such prior Act, it is simply an abuse of words to say that by such amendatory Act it *re-enacted said former Act*, or was "doing over again" *what it did when it passed such former Act*. To do something different is clearly *not* to do the same thing over again.

It was also contended for respondents below that, conceding that the Laclede Gas Light Company was exempted from the operation of Section 6 of the Act of November 23, 1855, "that fact did not in any manner exempt said corporation or the legislature from the operation of Section 2, Article VIII of the Constitution of 1865." But this cannot be true if, as above shown, the Act of March 26, 1868, was *not an Act such as described in that section* — viz., an Act *reviving* or *re-enacting* any Act such as therein specified. The Act of March 26, 1868, was an Act to *amend*, and not an Act to *revive* or *re-enact* the Act of March 2, 1857, and was therefore not within that constitutional provision; and as held in *State ex rel.* v. *C. & G. R. R. Co.*, affirmed in *St. Jo. &c. R. R. Co.* v. *Shambaugh*, *supra*, the legislature of 1867 had full power to amend existing corporate charters.

III.

Said amendatory Act of March 26, 1868, is not void as being in conflict with Section 25 of Article IV of

the Missouri Constitution of 1865, as by respondents alleged.

Following is the constitutional provision referred to: [1] —

XXV. "No act shall be *revived* or *re-enacted* by mere reference to the title thereof; nor shall any Act be *amended by providing that* designated words thereof shall be struck out, or that designated words shall be struck out and others inserted in lieu thereof; but in every *such* case, the Act revived or re-enacted, or the Act or part of Act amended, shall be set forth and published at length as if it were an original Act or provision."

Said Section 25 of Article IV contains two distinct provisions, namely: —

(1) That no Act shall be *revived* or *re-enacted*, by *mere reference to the title* thereof:

(2) That no Act shall be *amended* by the legislature *in the particular manner or form of amendment specified* in said Section 25.

1. Obviously, the former of these provisions does not apply to the Act of March 26, 1868. That Act purports to and does amend the Act of March 2, 1857, not "*by mere reference to the title* thereof," but by new enactments enlarging the powers of said corporation, which, as will presently be shown, completely fulfil the remaining affirmative requirements of the constitutional provision in question.

2. As to the second prohibition in Section 25, Article IV, it is clear that no law can be held void as contravening its terms,—

Unless such law amends a prior Act,—

by providing that designated words thereof shall be struck out, or

[1] Gen. Stat. Mo. 1865, p. 31.

by providing that designated words shall be struck out and others inserted in lieu thereof:

It being further prescribed that,

In every *such* case,— that is, in every case where an Act is amended

by providing that designated words shall be struck out, or

by providing that designated words shall be struck out and others inserted in lieu thereof,—

the Act or part of Act amended shall be set forth and published at length as if it were an original Act or provision.

It was contended for respondent below that the Act of March 26, 1868, violates this requirement, because, as it was said:—

"It refers to 'all the rights, privileges and franchises granted to it by the 5th section of the act to which this act is amendatory,' which language is absolutely unintelligible without reference to Sec. 5 of the Act of 1857, and reading into the Act of 1868, the provisions of the Act of 1857, which conferred such rights, privileges and franchises; and that it strikes out from the 5th Section of the Act of 1857, the words 'during the continuance of this act,' and substitutes therefor the word 'forever;' and, in that, the Act of 1868 attempts to repeal Sec. 6 of the Act of 1857, by simply employing the following language 'and the 6th Sec. of said act, to which this act is amendatory, is hereby repealed.'"

Referring presently to the decisions of the Supreme Court of Missouri by which a settled construction has been placed upon this clause, let us consider what is the plain meaning of those words, taken in their ordinary sense, and in connection with the methods of legislation in use prior to 1865.

It is clear, we confidently submit, that this restriction applies only to a *particular method or form of amendment*, of which the Session Acts before 1865 afford numerous examples, and which the framers of that constitution specially prohibited in words so precise as to leave no doubt what they meant.

In any volume of Missouri Session Acts prior to 1865, will be found illustrations of at least six different forms, theretofore adopted by the legislature in framing amending Acts, which may be briefly described as follows. The former Act is amended,—

(1) Without repealing or altering any existing section, by adding entirely new sections thereto: *e. g.*, the Act of March 14, 1859 (Mo. Acts 1858–9, p. 438), amending Chap. 164, R. S. 1855, concerning change of venue in civil cases: also Act of March 20, 1860 (Acts 1859–60, called sess., p. 5), amending the attachment act (R. S. 1855, p. 236, Ch 12); or

(2) By expressly repealing a section or sections designated by number, and enacting, at length, different provisions on the same subject; *e. g.*, Act of January 16, 1860 (Acts 1859–60, p. 526), amending Act of March 14, 1859 (Acts 1858–9, p. 448); or

(3) By enacting that a designated section or sections of an existing Act "be so amended that" — or "be and is hereby amended so that" — after which the intended amendment is set forth in full, differing, sometimes entirely and sometimes only as to certain words, from the prior Act; *e. g.*, Act of February 15, 1864 (Acts 1863–4, p. 28), amending the general law concerning divorce (1 R. S. 1855, p. 662); or

(4) By enacting that an existing Act, or a designated section or sections thereof, "be and is hereby amended *so as to read*" — after which the intended amendment is set forth, sometimes differing entirely, and sometimes only as to certain words from the Act or section amended; *e. g.*, Act of Feb. 13, 1864 (Acts 1863–4, p. 110), amending the

Act of Dec. 4, 1855, concerning county treasuries (1 R. S. 1855, pp. 519, 530); or

(5) By expressly repealing a designated section or sections, and enacting complete new sections, differing from those repealed *only in omitting certain words or omitting certain words and substituting others therefor; e. g.*, Act of February 5, 1864 (Acts 1863–4, p. 279) amending Act of January 16, 1860 (Acts 1859–60, p. 256, sec. 12); or

(6) Without adopting either of the preceding methods, by simply enacting that *designated* words in the act amended shall be struck out and other *designated* words inserted in lieu thereof; *e. g.* Act of November 23, 1863 (Acts 1863–4, p. 112), amending the Act to provide for, etc., the State University (2 R. S. 1855, pp. 1494, 1499), which is in full as follows:—

"§ 1. That the third section of the second article of the act to which this is amendatory shall be so amended that the word 'eighteen' be stricken out and 'twenty-two' be inserted in its stead.

"This act to take effect and be in force from and after its passage."

Of these, form (6) alone answers to the description in Art. IV, Sec. 25, of the form of amendment thereby prohibited. It follows that this section does not prohibit either of the other forms of amendment above mentioned; for if either of those forms were adopted, it would not be true that an Act was amended —

"*By providing that* designated words thereof shall be struck out, *or that* designated words shall be struck out and others inserted in lieu thereof."

The words "*by providing that*" can have but one meaning — viz.: that the form, and *the only* form, of amending Act forbidden, is one *which in terms provides* that "designated words shall be struck out," etc.; for no amending Act which *does not so provide* is within that description.

It is equally clear that the words which follow those above quoted do not modify this intentionally precise description of the form of amendment prohibited. The remainder of the sentence is —

"But *in every such case* the act revived or re-enacted, or the act or part of act amended shall be set forth and published at length as if it were an original act or provision."

It does not say — "in every case," but — "in every *such* case," that is, in every case of amendment *such* as already described, namely, in every case in which an Act is amended "*by providing that* designated words thereof shall be struck out *or that*," etc., which clearly excludes every case other than the two thus particularly described.

Even if these words were ambiguous, the doctrine above cited would apply, that — "In cases of doubt, every possible presumption, not directly and clearly inconsistent with the language and subject-matter, is to be made in favor of the constitutionality of the Act: " but we submit that there is no ambiguity here. No language could more clearly specify the particular form of amendment prohibited, and to such a case applies with special force the general rule of interpretation, thus laid down by Judge Cooley, citing many cases,—

"Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction." Cooley Const. Lim., 5th ed., p. 68 (pp. *56–57).

But this is no new question. The construction contended for by relator is established by repeated decisions of the Supreme Court of Missouri, affirming the validity of amending Acts of great public, as well as private im-

portance, during the past twenty years. Upon these decisions, as that Court remarked in *State* v. *Bennett*,[1] the legislature has repeatedly acted; and it is respectfully submitted that were this Court now to reverse or ignore the doctrine thus established, it would so unsettle both private rights and the duties and powers of public officers hitherto securely resting upon these decisions, as to result in wide-spread confusion, if not disaster.

Following is a brief statement of the more important decisions above referred to.

In *Mayor &c. of Boonville* v. *Trigg*,[2] the only question was whether the Act of March 23, 1868,[3] amending *in part* section 1 of the Act of February 8, 1839,[4] incorporating the city of Boonville, was invalid, as not complying with Art. IV., Sec. 25, of the constitution of 1865.

Section 1 of the Act of 1839 (Boonville charter) reads as follows, omitting in part the description of boundaries:—

"§ 1. All that district of country within the following limits, to wit: beginning at the mouth of the branch below and east of Boonville," * * * (description of boundaries) * * * "thence north, to the beginning, shall be and is hereby erected into a city by the name of the city of Boonville; and the inhabitants thereof shall be and are hereby constituted a body politic and corporate by the name," etc. * * * (corporate powers set forth) * * * "may have a common seal and make and alter the same at pleasure."

The remaining twenty-nine sections of the Act provide in detail for the city government, etc.

The amending Act of March 23, 1868, reads as follows:—

"Section 1. That *so much of section one* of an Act entitled 'An act to incorporate the city of Boonville,' approved

[1] 102 Mo. 364.
[2] 46 Mo. 288.
[3] Mo. Acts, 1868, p. 191.
[4] Acts 1888-9, p. 294.

February 8, 1839, *as relates to* the bounds and limits of the city of Boonville, *be amended so as to read as follows:* 'all that district of country within the following limits, to wit: beginning at the southeast corner of,' etc., * * * (description of new boundaries) * * * 'thence east, following said township line to the place of beginning.'"

The above is all of section 1, and is *all of said amending Act which purports to amend said charter.* The only remaining section of said Act is as follows: —

"Section 2. The foregoing amendment shall take effect as soon as it shall be accepted by the inhabitants residing within said limits, and not before, in a manner following, that is to say" * * * (at a special election to be called for the purpose as provided).

Concerning this amending Act, it will be observed: —

1. That it does not amend the original charter "*by providing that* designated words thereof shall be struck out, or that designated words shall be struck out and others inserted in lieu thereof" — viz., in form (6) above mentioned; but provides that said act shall "be amended *so as to read*" — that is, in form (4) above mentioned. The necessary *effect* of this amendment is, however, *to strike out of section 1 of the Act amended certain words,* not designated in the amending Act, but indicated therein by description, as "*so much of section one* of an Act entitled," etc., "*as relates to the bounds and limits of the city of Boonville*" and *to insert in the Act amended, in lieu of the words thus* (*in effect*) *struck out,* a new description of the city limits of Boonville, which is set out at length in the remainder of section 1 of the amending Act, *no other part of the Act amended being set out therein.*

2. That the portion of the Boonville charter thus amended, viz.: "*so much of section one*" of said charter "as relates to the bounds and limits of the city of Boonville," is only part of a sentence: and that the description of the new city boundaries which the amending Act substitutes therefor is only a part of a sentence and is not by itself a complete enactment, *nor is even intelligible* without referring to and reading it in connection with the remainder of the section amended, viz., "shall be and is hereby erected into a city," etc., etc., to the end of that section.

Clearly, if Art. IV. Sec. 25 of the constitution required "the *part of act amended*" to be set forth and published at length, etc., in the amending Act, *in the sense* that the new Act should set forth *the entire section as it would read* when amended, this was not a compliance therewith. On that ground, the Circuit Court held the amending Act unconstitutional and void, as not complying with Art. IV. Sec. 25, of the constitution. On appeal, the defendant (Trigg), contended,[1] that this construction of that section was correct, on the ground that its object was "to force the legislature to so enact amendments that the courts and all others might see at a glance, and without referring to the old law, the new law and amendments in all its bearings," — which, it was said, this amending Act did not do.

But the Supreme Court reversed the judgment below, holding that "the constitution was strictly complied with," and the amendatory Act valid. After quoting in full Art. IV, Sec. 25, of the constitution, the court say:[2] —

"In this section it will be perceived that different provisions are made. Where an entire Act is revived or re-enacted, it must be set forth and published in whole. Where a whole Act is amended, the same course must be

[1] 46 Mo. 288-9.

[2] 46 Mo. 289.

pursued; but where a part of an Act is amended, the amendatory part only need be set out and published.

"Every person who is familiar with our past legislative history well understands the reasons which induced the insertion of this constitutional provision. Amendments were made in such a manner as to involve the law to which they pertained in inextricable confusion. Amendatory Acts were passed which required only the insertion of certain words, or the substitution of one phrase for another, in sections which were only referred to by their titles, but not published. After the amendments were so framed and clothed in doubt, obscurity and uncertainty, it was almost impossible to arrive at the real and actual intention. It was to obviate these difficulties that the requirement was made that every amendment, either to a whole Act or a part of an Act, should be set forth and published."

Certain provisions in the constitutions of Louisiana and Indiana, relied on by the defendants, are then referred to, but distinguished, and the court proceeds:—

"The constitution in these State sexpressly declares that where a section is amended, it shall be re-enacted and published at full length. *But our constitution only requires the Act or part of Act amended to be set forth and published.* That was done in this case. There was no striking out, or inserting words in lieu thereof, *but there was an amendment of part of the Act and the amendment was set forth and published entire. The constitution was strictly complied with.*"

A fortiori under this ruling, the Act in question amending the Laclede Gas Light Co. charter, complies with the constitutional provision. The intended *amendments* are not only set forth and published entire, but are on their face complete enactments, the effect of which is perfectly intelligible without referring to the Act amended; which is not true of the Act amending the Boonville charter, but which Act, nevertheless, was held to be in strict compliance with the constitution.

In *State* v. *Chambers*,[1] decided in 1879, the Act of April 17, 1877,[2] amending sections 1, 3 and 11, chapter 186 of the General Statutes of 1865, was called in question under Art. IV, Sec. 34, of the constitution of 1875, which contains a provision as to amending Acts, similar to section 25, Art. IV of the constitution of 1865, except that the last clause of the former reads — " but the words to be stricken out, or the words to be inserted, or the words to be stricken out and those inserted in lieu thereof, *together with the act or section amended*, shall be set forth in full *as amended*."

But said Act (of April 17, 1877) was held valid; the court again approving the rule in the Boonville case, and defining as follows (70 Mo. 628) the limits of the constitutional prohibition: —

" It will be observed that said sections 1, 3 and 11, as amended, are fully set out in the Act. Section 3 of said Act furnishes an illustration of *what was intended to be forbidden* by section 34, article 4 of the constitution. If said section *had only contained the words* 'Section 3 of said chapter 186 is hereby amended by striking out the words 'assault, battery, affray or other breach of the peace,' in the third and fourth lines of said section, and inserting in lieu thereof the words 'a misdemeanor,' the amendment *would have been in clear violation* of said constitutional provision."

This illustration of " what was intended to be forbidden by Section 34, Article IV, of the constitution " (of 1875)— which, as above shown, is more stringent than Art. IV, Sec. 25, of the constitution of 1865 — cannot be reconciled with the proposition that an amending Act which does not *provide for* striking out designated words, etc., but the *effect of which* is to substitute a new provision for an old

[1] 70 Mo. 625.

[2] Acts 1877, p. 281.

one, is void unless the entire new section, as it will read when amended, is set forth in the amending Act.

In *State* v. *Geiger*,[1] decided in 1877, the question was as to the validity of section 4 of the Act of March 9, 1872,[2] by which was amended section 33 of the general election law,[3] The defendant contended that said amending Act was void, because it did not set out in full the section amended, as required by Art. IV, Sec. 25, of the constitution (1865), nor in any manner refer thereto. But it was held valid, on the ground[4] that —

"The provision of the constitution above referred to was not directed against repeals by implication, or against original legislation, the effect of which would be to alter or modify previous laws; but it refers to such Acts only as are in terms amendatory in their character."

In *State ex rel.* v. *Draper*,[5] decided in 1870, it was also held that Art. IV, Sec. 25, of the constitution (1865) did not prohibit the amendment or repeal of former Acts by implication. Both these cases are affirmed in later decisions, below referred to.

In *Morrison* v. *St. Louis, I. M. & S. Ry. Co.*[6] was held valid the Act of April 17, 1877,[7] amending the Act of March 15, 1875,[8] concerning the collection of taxes, as not being in contravention of Art. IV, Sec. 34, of the constitution of 1875. The following extract from the opinion of the court[9] in terms limits the constitutional provision in question to enactments in form (6) above given.

"Under this constitutional provision, it is quite common for the legislature to first state that certain words

[1] 65 Mo. 306, 312.
[2] Acts 1871-2, p. 13.
[3] 1 Wagner's Stat., 1872, p. 570.
[4] 65 Mo. 313.
[5] 47 Mo. 29.
[6] 96 Mo. 602, 606.
[7] Acts 1877, p. 362.
[8] Acts 1875, p. 124.
[9] 96 Mo. 606.

of a specific section are stricken out and others inserted, and then set out in full the section as amended, *but the constitution makes no such requirement.* In former times, a practice had grown up of amending an Act, or a section of an Act, *simply by saying* that designated words were stricken out, or that they were stricken out and others inserted, leaving it to the reader to examine both Acts and make the erasure and substitution. *This practice the constitution prohibits*, and when a section of an existing statute is amended, the sections, as amended, must be set out in full; nothing more is required." (Citing *State* v. *Chambers*, 70 Mo. 626.)

In the important case of *State ex rel.* v. *Miller*,[1] decided in 1890, was called in question the validity, under Art. IV, Sec. 34, of the constitution (1875), of the act of March 30, 1887.[2] This Act, under the guise of a general law relating to cities having over 300,000 inhabitants, was passed for the sole purpose of reorganizing the St. Louis Board of Public Shools; to which end it changed in numerous and important particulars several special Acts under which that body existed, but only by new affirmative enactments, without setting forth or referring to any particular Act or section so amended.

Referring to said Art. IV, Sec. 34, the court say[3]

"The object of this section is sufficiently stated in *Morrison* v. *Railroad*, 96 Mo. 602. It is there shown that when an Act undertakes to amend a former statute, it is not sufficient *to say certain words are stricken out, or certain words inserted*, but the section as amended must be set out in full, *and this is all that is required.* Here it is true, portions of the special Act creating the school corporation are repealed or modified by this Act of March 30, 1887, *and the last named Act does not name the sections which are thereby repealed nor are the sections thereby modified set out in their modified form.* This may lead

[1] 100 Mo. 439, 446. [2] Act 1887, p. 272. [3] 100 Mo. 446.

to inconvenience in requiring a comparison of the old and new law, but such legislation is not prohibited by the provision of the constitution before quoted. The constitution of 1865 contained a provision much like the one now in question, under which it was held that repeals by implication were not prohibited. *State ex rel.* v. *Draper*, 47 Mo. 29; *State ex rel.* v. *Maguire*, 47 Mo. 35. The repealing clause of the Act now under consideration is no more, in effect, than a repeal by implication.

"This Act does not seek to amend any former law *by simply striking out designated words, or by inserting certain words, or by striking out words and inserting others in lieu thereof, and is not within the constitutional prohibition.*"

The last sentence directly sustains the construction above placed upon the constitutional provision in question, in its most stringent form.

State v. *Bennett*[1] is equally conclusive of the correctness of the conclusions above reached. The question was as to the constitutionality of the Act of February 17, 1875,[2] amending the Act of March 27, 1861, establishing the St. Louis Board of Police Commissioners, and the Act of March 13, 1867, amendatory thereof. It was claimed to be void, under Article IV, Section 25, of the constitution of 1865, in that it did not set out in full the sections of said prior Acts as amended. This objection, if valid, was fatal, both to the Act of February 17, 1875,[2] and that of March 13, 1867, each of which made important changes in the Act amended thereby, but only by affirmative enactments, without either republishing the old law or setting forth in full the new sections *as amended*. But the court upheld the Act as constitutional, citing *State* v. *Draper*,[3] *Mayor &c. of Boonville v. Trigg*,[4] and *State* v. *Chambers*,[5]

[1] 102 Mo. 356, 362-4.
[2] Acts 1875, p. 337.
[3] 47 Mo. 29.
[4] 46 Mo. 288.
[5] 70 Mo. 625.

This is far broader than the Missouri provision, and in terms applies to every case of an amended Act, in whatever form amended. Yet that court declined to construe it as here contended for by respondent. The opinion proceeds —

"The act before us does not assume, in terms, to revise, alter or amend any prior act or section of an act, but by various transfers of duties, it has an amendatory effect *by implication*, and by its last section it repeals all inconsistent acts. *We are unable to see how this conflicts with the provision referred to.* If, whenever a new statute is passed, it is necessary that all prior statutes modified by it by implication should be re-enacted and published at length as modified, then a large portion of the whole code of laws of the State would require to be republished at every session, and parts of it several times over, until, from mere immensity of material, it would be impossible to tell what the law was. * * * This constitutional provision must receive a reasonable construction, with a view to give it effect. The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. *An amendatory act which purported only to insert certain words, or to substitute one phrase for another in an act or section which was only referred to but not republished, was well calculated to mislead the careless as to its effect, and was sometimes drawn in that form for that express purpose.* Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation. But an act complete in itself is not within the mischief designed to be remedied by this provision *and cannot be held to be prohibited by it without violating its plain intent.*"

The Act in question was therefore held to be valid under that provision of the Constitution of Michigan.

Plaintiff therefore insists that the Act of March 26, 1868,

was not in conflict with Section 25 of Article IV of the Constitution of 1865, but was and is a clearly constitutional and valid amendment of the Act of March 2, 1857.

IV.

Relator's charter did not expire on March 2, 1887. If the Act of March 26, 1868, was void, as alleged, then, since the City of St. Louis failed to purchase said company's property, its charter was extended to March 2, 1917, by Section 6 of the Act of March 2, 1857. But the amendatory Act of March 26, 1868, was valid, and granted to relator "to have, hold and enjoy FOREVER *all the rights, privileges and franchises granted to it by" said Act of March 2, 1857, as enlarged by said amendatory Act; and in virtue thereof relator now holds its franchises.*

By section 6 of the Act of March 2, 1857, the validity of which is not questioned, it was provided, —

"The said city shall have the right at the expiration of *twenty years from the time of the organization of said company*, under this charter, to purchase all the property and effects of the same, paying therefor to the same the value of such property and effects with twenty per cent added thereto, such value to be fixed by two appraisers. * * * If said city fail so to purchase said property and effects, then this charter *shall be and is hereby renewed and extended* for the further period of thirty years after the expiration hereof." [1]

By Section 9 of said Act it was to continue in force for thirty years from March 2, 1857.

It was averred by relator [2] and admitted by respondent's demurrer, that relator was duly organized under said charter in 1857, but that the City of St. Louis never pur-

[1] *Supra*, pp. 5–6.

[2] *Supra*, pp. 17–18.

chased or offered to purchase the property and effects of said company or any part thereof.

It follows that whether the Act of March 26, 1868, was unconstitutional and void, or was constitutional and valid, in either case relator's charter did not expire on March 2, 1887, but is still in force,—

Because (1) if the Act of March 26, 1868, was void, then the Act of March 2, 1857, remained in force without amendment; and, since it is admitted that the city never purchased or offered to purchase the company's property, Section 6 of said Act became operative in 1877, and said charter was "*thereby* renewed and extended for the further period of thirty years;" but (2) if the Act of 1868 was constitutional and valid, as an amendment of the Act of March 2, 1857, it empowered relator to hold and enjoy *forever* the corporate rights, etc., granted to it by the fifth section of the Act of 1857, thereby repealing Section 9 of said Act of 1857 as necessarily inconsistent therewith.

For the reasons above given, and also in view of the decisions of the Supreme Court of Missouri, presently referred to, the latter conclusion is inevitable.

It was contended below, however, that even though the Act of 1868 was constitutional and valid, yet, since that Act did not expressly repeal Section 9 of the Act of March 2, 1857, the corporate life of relator was still limited by that section to thirty years, and therefore expired on March 2, 1887. This argument was thus stated:—

"No change was made by the Act of 1868, in Sec. 1 or Sec. 9 of the Act of 1857, so that the Act of 1857, as amended by the Act of 1868, if the Act of 1868 is a legal act, would read in this way: The company is given the right in Sec. 1 to have 'perpetual succession;' is given the right by Sec. 5 to enjoy its franchise 'forever;' and Sec. 6 which gives the city an option within twenty years, and extends the life of the company an additional thirty years

if the city did not purchase, is stricken out; and by Sec. 9 the continuance of the act, as thus amended, is limited to thirty years from the date of its passage, to wit, to March 2d, 1887.

"Thus Sec. 1 confers the capacity of immortality; Sec. 5 gives the company *unlimited* duration; and Sec. 9 *limits* the life of the company to thirty years after March, 1857.

If we may assume that such a contention will be renewed in this court, it refutes itself. It represents the legislature as expressly granting in one section, by the word "*forever*," what was at the same time purposely withheld, it is said, by not expressly repealing another section. It disregards the ruling in *State* v. *Draper*,[1] affirmed in *State ex rel.* v. *Miller*,[2] that the Constitution of 1865 sanctioned amendments by implication. That constitution, said the Court —

"— has not said that when an Act is passed inconsistent with a preceding one, so that both cannot stand, the latter one shall be void, and the earlier one shall prevail, but has left the law as it always has been, viz., that when two statutes are inconsistent and repugnant, the last one enacted shall be considered in force."

Certainly the Act of 1868 could not mean that relator should enjoy *forever* the franchises referred to, and at the same time that its corporate existence should expire in 1887, nineteen years after the date of the amending Act. In the recent and important case of *State ex rel.* v. *Payne*,[3] the Supreme Court of Missouri,[4] while holding that the words "perpetual succession," without more, in the charter of a private business corporation, imported continuous, but not necessarily unlimited, duration, conceded the contrary if the word *forever* were used, as in *State* v. *Stor-*

[1] 47 Mo. 32.
[2] 100 Mo. 446.
[3] 31. S. W. Rep. 797.
[4] June, 1895.

mont,[1] in which the charter was held unlimited in duration.

Further proof, if any were needed, that such a construction is not only unreasonable, but impossible, is furnished by the circumstances under which the Act of March 26, 1868, was passed, as averred in relator's reply,[2] admitted by the demurrer, and fully set forth in the opinion of the Supreme Court in *St. Louis* v. *St. Louis Gas Light Co.*[3] In March, 1857, and thereafter until 1873, when the "Tripartite Agreement" was entered into between the City of St. Louis, the Laclede Gas Light Company, and the St. Louis Gas Light Company, the last named company, under its charter, granted in 1837, had the exclusive right of making and selling gas within the city limits; and in Section 3 of the Act of March, 1868, as remarked by the court below in the case last cited,[4] those rights were expressly recognized. In other words, although the Laclede Gas Light Company was in 1868, an existing corporation, having certainly nineteen and possibly forty-nine years to live, it was practically unable, except by permission of its rival, to do business. The legislature, to meet the wants of a large and growing city, saw fit to increase its powers, extend its territory, authorize the increase of its stock, remove the incubus of the city's right to purchase its property, and expressly grant to it unlimited duration; plainly intending (as the court remarked in that opinion)[5] that it "might obtain, if it could, from the St. Louis Gas Light Company, a waiver or abandonment of its right to exclude competition." Yet, it is said, the legislature, when it said *forever*, without *expressly* repealing Section 9 of the Laclede's original charter, meant *nineteen years!*

[1] 24 Kan. 686.
[2] *Supra*, pp. 16–17.
[3] 70 Mo., 69, 82, 119–20.
[4] 70 Mo. 120.
[5] 70 Mo. 120.

V.

The validity and duration of relator's charter, to wit, the Act of March 2, 1857, amended by the Act of March 26, 1868, are not open to question but are res judicatæ under three successive decisions of the Supreme Court of Missouri.

The decisions referred to were rendered in the three important cases of *St. Louis* v. *St. Louis Gas Light Co.*,[1] *St. Louis Gas Light Co.* v. *St. Louis*,[2] and *State ex rel. City of St. Louis* v. *Laclede Gas Light Co.*,[3] decided respectively in 1879, 1885 and 1890.

In the first two, the validity of the so-called "Tripartite Agreement," executed under date of February 28, 1873, by and between the City of St. Louis, the St. Louis Gas Light Co. and the Laclede Gas Light Co. (mentioned in relator's petition herein), was directly in question,— being denied by the city, which, for that purpose, amended its original petition and made the Laclede Company a defendant in the suit. In June, 1876, the Circuit Court, by interlocutory decree[4] adjudged the Tripartite Agreement void, sustained the city's claim to purchase the gas works of the St. Louis Gas Light Co. and placed its property in the hands of a receiver; and on February 12, 1877, finally decreed the title to the gas works in the city. That suit was then dismissed as to the Laclede Gas Light Co., but the St. Louis Gas Light Co. took an appeal to the St. Louis Court of Appeals, which affirmed the judgment below;[5] but the Supreme Court on appeal reversed that judgment and dismissed the city's bill. All the judges concurred, holding the Tripartite Agreement valid, and that this question was conclusive of the controversy.[6]

[1] 70 Mo. 69.
[2] 86 Mo. 495.
[3] 102 Mo. 473.
[4] 70 Mo. 91.
[5] 5 Mo. App. 484.
[6] 70 Mo. 115, 119–20, 121–2.

From the opinion of the Court, per Norton, J., we quote the following: [1] —

"The Laclede Gas Light Company obtained its right to make and vend gas, not from the St. Louis Gas Light Company, but from the act of the general assembly incorporating it, subject, of course, to the vested rights of the St. Louis Gas Light Company. When the act of 1857, incorporating the Laclede Gas Light Company, was passed, whereby it was authorized to make and vend gas only in a certain part of the city, *and when the amendatory act of 1868 was passed, whereby it was authorized to make and vend gas throughout the entire limits of the city*, the St. Louis Gas Light Company, by virtue of its charter, passed in 1837, had the right to exclude the Laclede Gas Light Company, as well as all other persons, from making and selling gas in the city. *This was evidently in the mind of the legislature when the act of 1868, amending the charter of the Laclede company, extending its right to sell gas through the entire limits of the city, was enacted;* and hence it was expressly provided therein that the right thus conferred could only be exercised in subordination to the vested rights of the St. Louis Gas Light Company to exclude all competition."

This was not *obiter dictum*, but necessary to the determination of the controversy. The question whether the tripartite agreement was valid necessarily involved the question of the corporate powers of each party thereto, and consequently the validity of the amendatory act of March 26, 1868. And one objection urged, both in the Circuit Court and in the court below, to the validity of that agreement, was the very point now under consideration, that the Act of March 26, 1868, was invalid, as in contravention of Section 25 of Article IV of the Constitution of 1865.

We quote as follows, from page 16 of the printed brief

[1] 70 Mo. 119–20.

of Leverett Bell, then City Counsellor, filed by him in the court below on behalf of the City of St. Louis, in the case referred to, on October 21, 1879; and to which, in the argument of the case at bar, the attention of the Court below was called. After referring to the original charter of the Laclede Gas Light Co., approved March 2, 1857, and the Act of March 3, 1857, amending the same, Mr. Bell said: —

"Upon March 26, 1868 (Laws of 1868, p. 187: Statement, p. 80), another amendatory Act was adopted, by which the rights granted by the 5th section of the original Act of March 2, 1857, were attempted to be granted to the company throughout the corporate limits of the city. But the Act of March 26, 1868, is inoperative, because it conflicts with Section 25 of Article IV of the Constitution of 1865, then in force, which provides that 'no Act shall be revived or re-enacted by mere reference to the title thereof;' * * * 'but in every such case the Act revived or re-enacted, or the Act or part of Act amended, shall be set forth and published at length, as if it were an original Act or provision. *French* v. *Woodward*, 58 Mo. 66."

The files of that case also show that on the same day was filed with Mr. Bell's brief in said cause, a printed copy of the opinion of Judge Gottschalk, stating the grounds on which the decree of the Circuit Court above mentioned was rendered in that case; to which also, in the argument of this cause, the attention of the Court below was called. From page 8 of that opinion we copy the following, in reference to said Act of March 26, 1868: —

"The Constitution provides that no Act shall be revived or re-enacted by mere reference to the title thereof, but in every such case, the Act revived or re-enacted, or the Act or part of Act amended, shall be set forth and published at length, as if it were an original Act or provision. Again,

by Section 32 of the Constitution, it is provided that if any subject embraced in an Act be not expressed in the title, such Act would be void as to so much thereof as is not expressed.

"The Act of 1868 violates both of these provisions. In the title it refers only to the Act of March 2, 1857, and in its body it attempts to repeal an Act passed March 3, 1857. Again, it pretends to amend or revive an Act, but entirely fails to set forth or publish the same at length. This can not be done (*French* v. *Woodward*, 58 Missouri, p. 66), and the Act of 1868 must therefore, and to that extent, be held unconstitutional and void."

This question is therefore *res judicata*, under the doctrine of the Missouri Supreme Court in *Chouteau* v. *Gibson*, that [1] —

"A decision made in a case by the highest court empowered to pass upon it, is conclusive upon the parties to the controversy, and their privies, who are not allowed afterward to revive it in a new proceeding for the purpose of raising the same on any other question. The matter in controversy has become *res judicata*, a thing definitely settled by judicial decision, and the judgment of the court imports absolute verity. Whatever the question involved — whether the interpretation of a private contract, the legality of an individual act, *or the validity of a legislative enactment*, the rule of finality is the same."

In the second case,[2] the Supreme Court again asserted the validity of that amendatory act. That was a suit by the St. Louis Gas Light Co. against the city, for gas furnished under the "Tripartite Agreement." The city again set up the invalidity of that agreement, but the Supreme Court overruled that defense as follows: [3] —

"2. Further defense is that the contract sued upon must bind all of the parties or none, and that the Laclede Gas

[1] 76 Mo. 47. [2] 86 Mo. 495. [3] 86 Mo. 499.

Company had no power to make the contract in question, and hence it is void as between the city and plaintiff. It is assumed, not decided, that the first branch of the proposition is correct, but the second is not true in point of fact *or law*. The sixth section of the act of March 2, 1857, incorporating the Laclede Gas Company, gave to it and the city power to make any contracts they deemed best, with regard to lighting a portion of the city, and to the city the right to purchase the property of the company at the expiration of twenty years. *This section, it is true, was repealed by the act of March 26, 1868, and hence the conclusion contended for is drawn.* But, by the fifth section of the act of 1857, that company had power within a defined district to light the same, to make and vend gas and gas-light, and to lay down pipes therein, and 'all other powers necessary to execute and carry out the privileges and powers' thereby granted. *All of these rights, privileges, and franchises are, by the same act of March 26, 1868, extended over the corporate limits of the city. This legislation shows no intention to take away from the Laclede Gas Company its powers to contract with the city, but on the contrary, its powers in this respect are extended over the entire city limits.* * * * The validity of this contract was affirmed in a suit between these parties (70 Mo. 69), and the conclusion here stated is but a corollary of what was then said. It is true, the precise point now urged was not then ruled, but it was only because the exigencies of that case did not require it."

The third case referred to[1] was an original proceeding in the Supreme Court, *at October Term, 1890*, by the State of Missouri, at the relation of the City of St. Louis, against the Laclede Gas Light Company (plaintiff in error), for a writ of mandamus to compel it to reduce the price of gas to private consumers from $1.25 to 90 cents per thousand cubic feet, as required by city ordinance 15,482, *approved March 31, 1890*. Respondent's return to the alternative writ alleged, among other defenses, that its

[1] 102 Mo. 472.

charter was an irrepealable contract with the State, under which it had the right to fix the price of gas made and sold by it, which price could not be diminished by either State or municipal legislation. Relator filed a general demurrer to the return, which was fully argued and decided on all points in favor of the Laclede Company. We quote from the opinion of the court, on the point above stated, as follows: [1] —

"III. The third point at issue, as already stated, presents the question whether the charter of the respondent company, granted by the State, contains such features of a contractual nature as forbid and prevent any interference therewith either by the State government or by any municipality representing the authority of that government. The respondent company exists by virtue of a special charter granted March 2, 1857, *as amended by an act approved March 26, 1868.*"

The court then briefly summarizes [2] sections 1, 5, 7 and 8 of the act of March 2, 1857 (original charter), also copying sections 6 and 7 of the act concerning corporations, approved November 23, 1855,— from the operation of which said company was expressly exempted by section 8 of said charter, and continues: —

"The fifth section of the original act incorporating the respondent gave it ample powers of contracting with the city for making and vending gas, etc., and the amendatory act made its franchises co-extensive with the boundaries of the city. This point was inferentially thus ruled in *City of St. Louis* v. *St. Louis Gas Light Co.*, 70 Mo. 69, and thus ruled directly in a later case,— *St. Louis Gas Light Co.* v. *City of St. Louis*, 86 Mo. 495.

"It is not open to doubt or dispute that this power to make and vend gas carries with it as an inevitable incident the right to *fix the price of the gas thus made and*

[1] 102 Mo. pp., 483–5.

[2] 102 Mo., p. 484.

sold. • • • So that, by the terms of the charter of the respondent company its right to fix the price of its product was as much a part of its charter as if it had been in terms set forth in section 5 of the original act of incorporation."

It will be observed that this was a direct proceeding against the Laclede Gas Light Company brought by the City of St. Louis in the name and by authority of the State of Missouri; in which the true construction and effect of the Act of March 26, 1868,— necessarily including the question of its validity as a legislative act,— were directly adjudicated by the Missouri court of last resort.

It is respectfully submitted that the contention of these respondents against the validity of relator's charter cannot be sustained except by disregarding or reversing these judgments, by which the Supreme Court of Missouri has held that the Laclede Gas Light Company lawfully holds and enjoys, under an irrepealable contract with that State, the rights and franchises granted to it by the Act of March 2, 1857, as amended by the Act of March 26, 1868. Upon the faith of those judgments, great sums of money have been invested in the stock and securities of this company by citizens of this and other States. Respondents admit, by their pleadings, that relator, exercising the franchises and fulfilling the duties set forth in said charter, not only is furnishing light by means of gas *and electricity* to many thousand private consumers in the city of St. Louis, but under contract with the city itself is lighting the public streets and alleys thereof by electricity and is under obligation to do so for a number of years to come; and that the very purpose of this application, made on the faith of the judgments of this court declaring that charter valid and irrepealable, is that relator may with the greatest convenience to the public, and the least danger to human life, fulfill its charter obligations.

It is under these circumstances that the City of St. Louis asks this Court to render a judgment in this proceeding, which shall not only deny to relator its rights, but shall accomplish that object by disregarding the plighted faith and repudiating the acknowledged obligations of the State of Missouri.

VI.

CONSTRUCTION OF RELATOR'S CHARTER: ELECTRICITY.

The grant by the State to relator includes the right to use electricity for illuminating purposes.

1. Relator's charter powers include (1) carrying on the business of artificial lighting, (2) making and vending gas, gas lights, gas fixtures and any substance or material which was in 1857 or might thereafter be used as a substitute therefor, and (3) all other powers necessary for said purposes.

2. Electricity is a substance, within the meaning of said charter, which relator has power to make and use, as a substitute for gas, in producing electric light as a substitute for gas light.

3. Carbon is a material, within the meaning of said charter, which relator is empowered to use as a substitute for gas in producing electric light as a substitute for gas light.

4. It is immaterial whether the art of producing light by electricity was known in 1857; but that it was then known the pleadings admit,[1] and the Court will take judicial notice.

[1] *Supra*, pp. 27:29.

It was contended for respondents below [1] that, even conceding the validity of relator's charter as claimed —

"Relator is not entitled to the relief asked for in this case, because respondent says that it has never by any Act been granted a franchise to make and vend electricity for any purpose whatever, but that whatever rights, privileges and franchises it ever enjoyed were confined to making and vending gas, gas lights, gas fixtures and any substance or material used as a substitute therefor, and that electricity, whether used for lighting or power purposes, is not a substance or material, and hence relator has not any right to make or vend the same anywhere."

The rule by which the charter of a business corporation is construed, to determine its corporate powers, is well settled, and is thus stated by the Supreme Court of Missouri in *Henning* v. *U. S. Insurance Co.*: [2] —

"Corporations, where they are not restrained in any particular manner by their charter, may adopt all reasonable modes in the execution of their business which a natural person may adopt in the exercise of similar powers."

In *Kitchen* v. *Cape Girardeau, &c., R. R. Co.*,[3] that court said:—

"In the absence of charter restrictions, the power of a corporation to make contracts is usually measured by the general objects and purposes of the incorporation. It is always presumed that a corporate body may make any proper contract whose scope and tendency are manifestly to forward the design of its legislative creation."

In *Callaway M. & M. Co.* v. *Clark*,[4] that court held that a company incorporated for the purpose of mining

[1] Supra, pp. 12, 14: Pr. Rec., pp. 27, 28.
[2] 47 Mo. 432.
[3] 59 Mo. 517-18.
[4] 32 Mo. 305, 308.

and transportation of coal, with power to construct a railroad from its coal lands to the Missouri River, and to purchase, hold, etc., any other property needful "and purchased only for the carrying on of its business of mining and manufacturing in said County of Callaway" had corporate power to purchase and use a steamboat for the transportation of its coal from the terminus of its railroad across the Missouri River.

The same general rule is found in the most approved treatises on the law of corporations,[1] and was sanctioned by this Court in *Green Bay, &c., R. R. Co.* v. *Union Steamboat Co.*,[2] citing *Thomas* v. *R. R. Co.*,[3] and in *Ft. Worth City Co.* v. *Smith Bridge Co.*[4]

The charter powers in virtue of which relator claims the right here in question are set forth in Section 5 of the Act of March 2, 1857, as amended by Section 1 of the Act of March 26, 1868.[5]

By these sections, the right is expressly granted to relator, anywhere within the corporate limits of the City of St. Louis, as then or thereafter established, —

(1) To carry on the business of lighting said city: also;

(2) To carry on the business of making and vending gas, gas-lights and gas-fixtures, and of making and vending any substance or material that might, at the date of said charter or thereafter, be used as a substitute *therefor*, — that is, as a substitute for gas, or for gas-lights, or for gas fixtures; and relator is further authorized,

(3) *To that end* to establish and lay down, anywhere within said corporate limits, all pipes, fixtures or other thing properly required in order to exercise any or all of the powers above mentioned: *provided* that this be done

[1] 1 Morawetz, Corp., §§ 320-21. 2 Beach, Priv. Corp., Sec. 385.
[2] 107 U. S. 98.
[3] 101 U. S. 71.
[4] 151 U. S. 301.
[5] *Supra*, pp. 5–7.

with as much dispatch and as little inconvenience to the public as possible: and

(4) To exercise all other powers necessary to execute and carry out the powers and privileges above mentioned.

It must be conceded that these provisions of the charter are to be reasonably construed, in accordance with the ordinary meaning of the words used, and in view of the purposes for which relator was incorporated.

The first grant of corporate power shows that the general purpose of the relator's incorporation was to provide for lighting the City of St. Louis; that right being granted to relator without restriction as to the method or means of exercising it.

The next grant of corporate power mentions one well-known means of illumination, to wit, by means of *gas*, which relator was expressly authorized to make and vend: and in the same connection, relator was authorized to make and vend *gas lights* and *gas fixtures*,— in other words, to furnish light also to private consumers.

But that clause also expressly authorizes relator to make and vend, not only gas, gas-lights and gas-fixtures, but also "*any substance or material* that may be *now or hereafter used* as a substitute *therefor*" — *i.e.*, as a substitute for *gas*, and for *gas-light*, and for *gas-fixtures*. Nothing could be broader than the power thus conferred upon relator to select and use *whatever means of illumination, and whatever method of applying it, might best accomplish the object of its incorporation as a lighting company*. The right to make and vend for that purpose any substance or material which might then or thereafter be used as a substitute for either gas, gas-light or gas-fixtures, includes, under the rule above mentioned, the right to use any such substance or material in any form or combination and by or in connection with any process suitable for that end.

But to light a city, the means of illumination must be furnished at innumerable points where the light is wanted. A question might arise whether relator's charter provided for this, or left the relator to obtain permission from the city to use the streets for that purpose. To prevent any doubt on this point, a further express grant of power is made, in the same sentence, as follows:—

"*And to that end*, may establish and lay down within any portion of said corporate limits, *all pipes, fixtures or other thing properly required to do the same* (the same to be done with as much dispatch and as little inconvenience to the public as possible)."

To what end? Obviously, to the end that the company may, without let or hindrance from the city or any officer thereof, exercise the privileges so granted to it; any interference with which, by any person *or body corporate*, subjects the offender, under Section 7 of said charter, to a heavy fine. It is also obvious that relator's right, "to that end, to establish and lay down all pipes, fixtures *or other thing* properly required to do the same," applies equally to any substitute for gas, for using which pipes and fixtures such as used to convey ordinary illuminating gas might not be suitable. Finally, as though to make absolutely certain the sufficiency and completeness of the powers so granted, the charter expressly confers upon relator —

—— "*all other powers* necessary to execute and carry out the privileges and powers hereby granted to said company."

No language more broad or effective than this could have been used to authorize relator to employ any means which then were or might thereafter become known and available for the purpose (1) of lighting the City of St. Louis, and (2) of furnishing light to private consumers, with the

right (3) *to that end*, to lay down in the streets of the city all pipes, fixtures *or other thing* properly required therefor.

But the respondents claim that relator is not empowered to make or vend electricity for lighting purposes, because, it is said, electricity is neither a "substance" nor a "material." If it be either, within the meaning of the charter, the objection fails.

The disjunctive "or", in the phrase — "any substance *or* material that may be now or hereafter", &c., — shows that the two words are used in different senses, and that the legislature intended to make the grant in the broadest possible terms.

1. Relator contends that electricity is a substance, within the meaning of the charter. The words of the charter must be reasonably construed in their ordinary sense, with reference to the purposes of the incorporation. The purpose for which these powers are granted is the production of artificial light, to be furnished and sold to the city and its inhabitants, for their benefit and for the profit of the company. The power granted is that of "making and vending * * * any substance or material that may be now or hereafter used as a substitute" for gas, *gaslights* and gasfixtures,— that is, for producing artificial light. If it is practicable to make and vend what is called electricity, and thereby to produce and furnish light which shall serve the purpose of light produced from gas, then electricity, whatever it is, is a substitute for gas, and the electric light a substitute for gas light. The charter itself furnishes the true test of its own meaning, namely,— whether electricity is something which can be *made* and *vended*, and *used as a substitute for gas*, for the production of artificial light. If it can, it is clearly within the purpose of the incorporation. However interesting to scientists may be the question — what is electricity? — it is simply irrelevant for the purpose of construing this charter.

Relator was incorporated for the production and sale of artificial light. Whatever can be *made* and *vended* so as to serve that purpose, relator is authorized to *make* and *vend*. No other construction of the charter is reasonable.

That electricity, whatever it may be, is something which can be *made* and *vended* and *used as a substitute for gas*, is not only a matter of common knowledge, of which the Court will take judicial notice, but is a fact expressly recognized by the general corporation law of Missouri, as amended in 1889 and now in force, which provides [1] —

"Sec. 2793. *Gas, electricity and water companies, powers of.*— Any corporation formed under the provisions of this article for the purpose of supplying any town, city or village with gas, *electricity* or water, shall have *full power to manufacture and sell*, and to furnish *such quantities of gas, electricity or water* as may be required in the city, town or village, district or neighborhood where located, for public or private buildings, or for other purposes; and such corporations shall have the power to lay *conductors for conveying gas, electricity or water through the streets*, lanes, alleys and squares of any city, town or village, with the consent of the municipal authorities thereof, and under such reasonable regulations as said authorities may prescribe.

"Sec. 2794. *Authority of municipality to contract, etc.*— The municipal authorities of any city, town or village are hereby authorized to contract with any such corporation *for the lighting by gas, electricity or supplying with water* the streets, lanes, alleys, squares and public places in any such city, town or village."

It will not do to say that the Missouri Legislature of 1889 knew more about electricity than the Legislature of 1857. Its use, as a substitute for gas, was generally known, in 1857, to be simply a question of time. Sir Humphrey Davy had shown in 1801, more than fifty years

[1] 1 Rev. Stat. Mo. 1889, p. 711.

previously, that electricity could be used to produce artificial light. In 1813, in a series of brilliant experiments before the Royal Institution in London, he produced a continuous electric light, between two carbons ten centimetres, or four inches, apart. In 1846, when the opera *Le Prophete* was produced in Paris, electric light was used on the stage to represent the sun, — which is said to have been the first really practical application of the electric light. In November, 1848, W. E. Staite publicly lighted by electricity the large hall of a hotel in Sunderland, England, which was described with enthusiasm by the London *Times;* and his apparatus was used in 1852, for lighting the Liverpool docks. In June, 1855, the *Quai des Celestins* at Lyons, France, was lighted by electricity ; the whole quay, according to contemporary accounts, being "flooded with refulgent rays by which one could read at a distance of 450 metres, or a quarter of a mile, from the light, and the very birds, believing day had come, quitted their nests under the eaves to fly about in the rays of the new sun." In July of the same year, the *Gazette de France* published a glowing account of the illumination by electricity of the Chateau Beaujon, at Paris ; and in October, 1856, an electric illumination was successfully carried out from the summit of the Arc de Triomphe de l'Etoile, by means of which the Avenue des Champs Elysees was illuminated for four hours.[1] Thus, before 1857, as averred by relator, and admitted by respondent's demurrer, the art of lighting not only buildings, but great public spaces, by electricity, was in practical use, though much remained to be done before it reached the stage of commercial success. There can be no reasonable doubt that these exhibitions of a new method of

[1] "The Electric Light, etc., its History," etc., by E. Alglave and J. Boulard (Sloane's translation: D. Appleton & Co., N. York, 1884), pp. 21–24.

illumination, so important, so successful and of such world-wide notoriety, were brought to the attention of the Missouri General Assembly of 1857 by the officers of the Laclede Gas Light Company when they applied for an enlargement of its charter privileges. But however that may be, the "right and privilege" then granted, "of making and vending * * * any substance or material that *may be now or hereafter* used as a substitute" for "gas, *gas lights* and gas fixtures," was broad enough and was intended, beyond any doubt or question, to include any and every improvement in the art of illumination, whether then known or not, whenever it should become available for use.

But the question whether light produced by electricity can be manufactured and sold and used as a substitute for gas light, has also been judicially determined by American courts of the highest authority, in construing important public statutes.

In *People ex rel. Brush Electric Illuminating Co.* v. *Wemple*,[1] the question was presented whether an electric lighting company was included within a general statutory exemption of *manufacturing corporations* from taxation. The defendant, as State Comptroller, undertook to enforce against the relator, an electric lighting company, certain statutory penalties for not making reports and paying taxes from which "manufacturing corporations" were exempt. The Supreme Court, on *certiorari*, held[2] that the relator was not a manufacturing corporation, and was not exempted; but this judgment was reversed by the New York Court of Appeals,[3] on the ground that a corporation whose business it was to produce and sell electricity for

[1] 129 N. Y. 543, (38 Am. & E. Corp. Cas. 657.)
[2] 15 N. Y. S. 711: 61 Hun, 53.
[3] 129 N. Y. 543.

lighting purposes was a manufacturing corporation. Said the Court: —

"According to the common understanding, the electricity, or thing which produces the results from which the corporation derives its income, is generated or produced by the application of power to machinery, and thus by means of a process wholly artificial, the relator is enabled to sell the product of its operations to its customers.

"Passing by the refinements of scientific discussion as to the nature of electricity, it would seem to be common sense to hold that a corporation that does all this is in every just sense of the term a manufacturing corporation. The mere appropriation or use of an article or thing which is furnished by nature is not a manufacturing operation. The liberation of natural gas from its hiding place in the earth, and its transportation through pipes to consumers, would not properly be called a manufacturing operation; but the production of illuminating gas, and its distribution to customers by means similar to the operation which the relator carries on, has been held by this court to constitute manufacturing, and a corporation organized for that purpose is a manufacturing corporation. * * * When we attempt to establish the proposition that the gas which lights one room is a manufactured product, and the electricity which lights another is not, we are obliged to rely more upon the definition of terms and the distinctions of scientists than the actual practical processes and operations by means of which results in all respects, or at least substantially, the same are produced. If due weight is given to the fact that electricity, as now used and applied to the business of life, such as the lighting of streets and buildings, the propulsion of cars and machinery, and like operations, is essentially the product of the skill and labor of man, there is no difficulty in reaching the conclusion that a corporation engaged in the business of generating, storing, transmitting and selling it is what was commonly known at the time of the passage of the corporation tax law in 1880, a 'manufacturing corporation.' * * * The electricity which is generated and transmitted by the operation of the relator, and which, under its manipulation, illuminates

houses and streets, is a very different thing from that mysterious element that is said to pervade nature."

The court also quotes the following from the testimony given by an expert before the Comptroller: —

"The electrical energy which is manufactured and sold by electric lighting corporations originally resides in and is extracted from the coal which is burned, or, more correctly speaking, from the heat which is produced by the combustion of coal. Electrical energy is produced at the central station. It may be stored up in cells of definite capacity, known as 'accumulators.' It may be, and in fact is, measured, and sold in determinate quantities at a fixed price, precisely as are coal, kerosene oil, and gas. It may be conveyed to the premises of the consumer upon a wagon, boxed up in an accumulator; or it may be sent through a wire, just as gas or oil may be transported either in a close tank or forced through a pipe. Having reached the premises of the consumer, it may be used in any way he may desire, being, like illuminating gas, capable of being transformed either into heat, light or power, at the option of the purchaser."

In *Commonwealth* v. *Northern Electric Light & Power Co.*,[1] a like exemption from taxation was claimed by an electric light company under a similar statute. The claim was disallowed in that case, because it was held that the words "manufacturing companies" used in that statute included only certain definite classes of corporations, specially mentioned in a series of Acts previously passed, — *e. g.*, corporations engaged in manufacturing woolen, cotton, flax or silk goods, iron, paper, lumber, salt, glass, etc., — among which electric-lighting corporations were not named. But the following passage from the opinion in that case was quoted by the New York

[1] 145 Pa. St. 105: *s. c.* 38 *s. c.* Am. & Eng. Corp. Cas., 651.

Court of Appeals in the case above cited, and is very pertinent here:

"This company whose charter we are considering, sells the electricity it makes, or 'brings into being,' as a commodity. It provides the lamps or appliances for the use of its customers by means of which the light is produced. It sells them the electricity, measures it as it is delivered, and is paid according to the quantity furnished. Whatever electricity may be, it seems absolutely within the power and under the control of the company that brings it into being. It is compelled, by the process employed, to come into being. It is secured, stored, poured out, or liberated at will. Its manifestations are both seen and felt. It moves with incredible velocity and power. It carries the tones and inflections of the human voice, or moves loaded cars, depending on the volume of the current and the manner of its application. It may be in the hands of a physician a soothing, remedial agent, and in the hands of the law an instrument of execution swifter and surer than the headsman's axe. It may be too early to show just what it is. *The scientists, whose views the learned judge adopted, may be right or wrong We have no need to decide that question. The laws are written, ordinarily, in the language of the people, and not in that of science;* and if this case depended on the question on which it turned in the court below, we should be led by the findings of fact to a different conclusion from that which was there reached, and hold that this company was *a manufacturing company.*"

2. But independently of all this, respondents' objection is conclusively answered if it appear that relator, in making and furnishing what is called *electric light*, as a substitute for *gas light*, is simply using some other *material* as a substitute for gas. The express averments in relator's reply,[1] the truth of which respondents' demurrer admits, show that such is the fact.

[1] *Supra*, pp. 18-20.

Under the rule laid down by the Supreme Court of Missouri in *Henning* v. *U. S. Insurance Co.*,[1] relator is empowered, in fulfilling the purposes of its incorporation, "to adopt all reasonable modes in the execution of its business which natural persons may adopt in the exercise of similar powers."

The mode by which, in familiar phrase, relator proposes "to use electricity for making light," is thus averred in its reply:[2] —

That for the purpose of lighting a city, or to illuminate any space therein, whether a public street or alley, or a building or any portion thereof, it is necessary to produce artificial light in the space to be illuminated; that artificial light is produced by making incandescent, that is to say, by bringing to a condition of white heat, in which it gives out light, any substance or material capable of being so used: that in order to light said city as aforesaid, relator was expressly authorized by its charter to make and vend not only illuminating gas, but any substance or material which might then or thereafter be used as a substitute therefor, and to that end to establish and lay down at any point within the corporate limits of said city all pipes, fixtures or other thing properly required to do the same: that illuminating gas is a highly inflammable compound of carbon and hydrogen, chemically combined in certain fixed proportions: that in order to use said gas for illuminating purposes, it must be set on fire, which decomposes said gas, setting free the carbon therein, in the form of fine particles, and rendering said carbon particles incandescent, which produces what is called gas light.

That light may also be produced from carbon, by means of electricity, to wit, by using carbon, not compounded with any other element, in the form of rods or filaments, which may be and are brought to a condition of incandescence by transmitting into or through said carbon rods or filaments what is called electricity, by means of apparatus suitable therefor; the result being that the carbon thus

[1] 47 Mo. 432: *supra*, p. 93.

[2] *Supra*, pp. 18-20.

rendered incandescent gives out what is called electric light, which has greater illuminating power than gas light and is commonly used as a substitute therefor, as well for the illumination of public streets and places as of public and private buildings in many cities throughout the United States.

That the right and privilege of lighting the city of St. Louis as aforesaid granted by its charter to relator, includes the production of light in the manner last above described, to wit, by making carbon or any other suitable substance incandescent by means of electricity, equally with the right or privilege of making and using carbon in its compound form of illuminating gas, and by making it incandescent in the manner above stated, to wit, by the application of heat; carbon being in either case the substance or material which is made incandescent, thereby producing light, though when illuminating gas is used, the carbon is in a compound form, the particles thereof being set free and made incandescent by heat as above stated, producing what is called gas light, while in the production of electric light pure carbon is used as a substitute for gas, and is made incandescent by the application of electricity.

It is true, as in said return alleged, that relator, therein exercising its corporate franchise of lighting the city of St. Louis, and of vending gas and gas light, has heretofore established, placed and laid down certain pipes and fixtures beneath the surface of the street on the east side of Broadway from Mound Street to Olive Street, and at divers and sundry other places beneath the surface of the streets of said city of St. Louis, for supplying gas to its consumers; and by means thereof relator has during more than ten years last past carried on, and still carries on, its business as a lighting company, of all which said city and the municipal authorities thereof had notice and have at all times acquiesced therein.

It is also true that in order to produce or furnish light by means of electricity, it is necessary to use wires for conducting the same, and to support said wires either on poles above the surface of the streets, as relator is now doing under a contract with said city of St. Louis, or in tubes or conduits beneath said surface. Relator states

that its purpose in making the excavation on Broadway, mentioned in said petition, was to construct and place underground a conduit for wires, such conduit and wires being properly required for the production of electric light as a substitute for gas light; that the conduit and wires intended by relator to be so laid down are of the most approved description, such as are used for like purposes in other cities, said conduits occupying when completed a space not exceeding thirty inches in width under the surface of the street, with provision for access thereto at suitable intervals through manholes properly covered and protected, less than forty inches in width at the surface of the street: the said conduits and manholes when completed and in use, offering no obstruction whatever to the use of the streets for travel and traffic, and the danger to life and property which attends the use of overhead electric wires, such as relator is now using under contract with said city of St. Louis for the purpose of lighting public streets and alleys therein, being entirely avoided by placing said wires in said conduits.

Even if the truth of these averments were not admitted on the record, the facts averred concerning the mode of producing light by gas and by electricity respectively are matters of common knowledge, of which this Court will take judicial notice. In *Brown* v. *Piper*,[1] approvingly cited by the Supreme Court of Missouri in *State* v. *Hayes*,[2] this Court said:—

"Courts will take notice of whatever is generally known within the limits of their jurisdiction; and, if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he may deem safe and proper. This extends to such matters of science as are involved in the cases brought before him. See 1 Greenl. Ev., 11; Gres. Eq. Ev., 294; and Taylor Ev., Sec. 4 and *post*."

[1] 91 U. S. 37.

[2] 78 Mo. 318.

In that case, this Court took judicial notice, not only of the effect of cold in preserving animal and vegetable substances, but of a particular method of constructing apparatus for artificial freezing, described in 7 American Encyclopædia, 474.

In *Wolfe* v. *Mo. Pacific R'y Co.*,[1] it was held that the nature, operation and ordinary uses of the telephone are facts of general scientific knowledge of which the courts will take judicial notice as part of public cotemporary history.

In *Udderzook* v. *Commonwealth*,[2] the defendant being charged with the murder of G, a photograph of G, proven to resemble a mutilated body found, was admitted in evidence, on the ground that judicial notice would be taken that photography was a means of producing correct likenesses.

In *Luke* v. *Calhoun County*,[3] the Court said, concerning photography:—

"It has been so long recognized, the mechanical and chemical processes employed and the scientific principles on which it is based, are so generally known, that it would be vain for a court to decline cognizance of it."

In view of the averments above set forth, the case stands thus. Relator's charter empowers it to make and vend *gas light*, or any substance or material used as a substitute therefor. Relator claims the right to make and vend *electric light*, or light produced by means of electricity, as such a substitute. Respondents deny this, because, it is said *electricity* is not a substance or material. But it is admitted of record, and the Court will take judicial notice also, that electric light, so called, is a perfect substitute for and an improvement upon gas light; that it is practicable,

[1] 97 Mo. 481-2. [2] 76 Pa. St. 340. [3] 52 Alabama, 119.

and relator intends, to make electric light, and vend it as a substitute for gas light, by using pure carbon, in the form of rods and filaments, being the identical *material* used (in its compound form of gas), for the production of gas light; the difference being that to produce *gas light*, the carbon is set free and made incandescent by the application of *heat*, whatever that may be, while, for the production of *electric light* the pure carbon, in the form of rods or filaments, is made incandescent by the application of *electricity*, whatever that may be. But relator's charter does not require or confine it to the use of heat to produce incandescence. Being empowered to use, for the production of light, any substance or material which can be used therefor, it is empowered to use any such material in any way, by any process, and under any conditions, "properly required therefor" and not otherwise unlawful, which will enable it to fulfill the purpose of its incorporation. It has therefore corporate power to make and vend electric light, produced in the manner averred and admitted in the pleadings.

VII.

Assuming the validity, duration and proper construction of relator's charter to be as above contended for, the enforcement by the City of St. Louis of the city ordinance mentioned in the pleadings,[1] *by denying to relator permission to lay its wires underground unless it shall comply with the conditions prescribed in said ordinance, is the denial of a right held by relator in virtue of said charter, and impairs the obligation of the contract contained therein. The judgment of the court below, upholding said ordinance as valid against relator, was therefore erroneous and should be reversed.*

[1] *Supra*, pp. 21–23.

The court below assumed, without deciding, "that relator is an existing corporation, possessing all the powers, rights and privileges its charter purports to confer upon it," including the right to use electricity for making light; and confined its inquiry to the question — "whether relator has a vested right to place its wires under the surface of the streets without the assent of the municipal authorities thereof and without compliance with valid ordinances of the city?" [1]

The only city ordinance whose existence is disclosed by this record, or of which this Court can take notice, is the ordinance mentioned in respondent's return; [2] the provisions of which (as re-enacted in 1892) are set out in full in relator's reply [3] and averred to be the only provisions of any existing ordinance of said city purporting to prescribe any regulations or conditions in respect of placing electric wires along, across or under any of the streets thereof; the truth of which averment is admitted by respondents' demurrer. It follows, upon the assumption above stated, that the case of these respondents, upon this record, depends absolutely upon the validity, as against relator, of the particular ordinance now before this court. Except as presented by the provisions of *that ordinance*, no question arises or can arise in this cause as to the extent either of the city's power to regulate the use of streets, or of its police power. Whatever its powers may be in that regard, the city has undertaken to exercise them by enacting and enforcing *that ordinance* and in no other way. If, in so doing, the city has exceeded its powers, that ordinance is void, as against relator, and the judgment below, which depends solely upon its validity, was erroneous and should be reversed.

[1] *Supra*, pp. 30-31.
[2] *Supra*, pp. 13-14: Pr. Rec., p. 27.
[3] *Supra*, pp. 21-23: Pr. Rec., pp. 51-55.

As above shown,[1] the corporate powers granted by the State to relator included not only the right (1) of lighting said city, and (2) of making and vending gas, gaslights and gasfixtures and any substance or material that might then or thereafter be used as a substitute therefor, but also the right,—

— *to that end*, to establish and lay down within the corporate limits of said city as then or thereafter established "all pipes, fixtures or other thing properly required therefor (the same to be done with as much dispatch and as little inconvenience to the public as possible)."

Relator's corporate power and right, under this grant, to lay and use *gas pipes* in the streets of said city is not denied. On the contrary, respondents aver that relator has exercised that right at divers places beneath the surface of the city streets for the purpose of vending and supplying gas to the consumers in said city.[2] But if relator has also the right to use electricity in making light,— that is, to make and vend electric light as well as gas light,— then it is equally authorized, "*to that end* to establish and lay down within said corporate limits *all pipes, fixtures or other thing properly required in order to do the same*" — upon the like condition — "the same to be done with as much dispatch and as little inconvenience to the public as possible." But respondents' return expressly avers[3] "that in order to convey electricity it is necessary to carry the same by means of wires strung on poles above the surface of the streets, or by means of wires strung in non-conductive tubes or conduits beneath the surface of the streets." It is thus admitted that an underground conduit such as relator

[1] *Supra*, p. 94, under VI.
[2] *Supra*, p. 13: Pr. Rec., p. 27.
[3] *Supra*, p. 13: Pr. Rec., p. 27.

desires to construct on Fifth Street is a "thing properly required" for making and vending electric light.

In other words, assuming that the State granted to relator the corporate powers above contended for (and assumed by the court below), such grant unquestionably included the right to lay electric wires under the streets, in conduits such as described in relator's reply.

But such a right is a corporate franchise, and such a grant is a contract by the State. In *New Orleans Gas Light Co.* v. *Louisiana Light Co.*,[1] this Court held that the right to use the streets of a city for laying gas pipes was a franchise or privilege the exercise of which can only be granted by the State or the municipality acting under legislative authority; citing to like effect the decisions of other courts, and Judge Dillon's work on municipal corporations.[2]

It further held that such a grant by the State is:—

—"none the less a contract, because the manufacture and distribution of gas, when not subjected to proper supervision, may possibly work injury to the public; for the grant of exclusive privileges to the plaintiff does not restrict the power of the State or of the municipal government of New Orleans acting under authority for that purpose, to establish and enforce regulations *which are not inconsistent with the essential rights granted by plaintiff's charter*, which may be necessary for the protection of the public against injury," etc.

The just limits of the police power, in respect to corporate franchises, thus indicated by this Court, were emphatically recognized by the Supreme Court of Missouri in *State ex rel.* v. *Greer*,[3] affirming *Sloan* v. *Mo. Pacific R.*

[1] 115 U. S. 650.

[2] State *v.* Cincinnati Co. Co., 18 Ohio St. 262; Boston *v.* Richardson, 13 Allen, 146; 2 Dillon Mun. Corp. (4th ed.), Sec. 691.

[3] 78 Mo. 195.

R. Co.,[1] and citing Judge Cooley's remarks on that subject.[2]

Such being the nature of the grant, to what extent does this ordinance undertake to restrict the franchise granted?

An inspection of its provisions[3] shows that it begins (Sec. 603) by absolutely prohibiting the placing of electric wires, tubes or cables along or across any street, etc., in St. Louis by any corporation which (not having previously accepted and complied with city ordinance No. 12,723, amended and replaced by this ordinance), shall not be "duly authorized by the Municipal Assembly, and then only as hereinafter provided." Section 612 provides that no corporation shall be entitled to any of the privileges conferred by this article except upon the conditions therein stated; and by Section 613 any corporation or any officer thereof, violating or failing to comply with the provisions of said article is declared guilty of a misdemeanor punishable by fine not exceeding $500.

It is admitted that relator never accepted or complied with city ordinance No. 12,723. It follows, if the ordinance here relied on be valid, that if the Laclede Gas Light Company, or any officer thereof, should attempt to exercise the franchise granted to said corporation by the State, *without first obtaining authority therefor from the Municipal Assembly of St. Louis*, without reference to the further conditions imposed by Section 612, said company or such officer would be liable to the penalty above stated. No conditions are prescribed, by fulfilling which such authority can be obtained. Whether, in respect of any particular corporation, it will be granted or denied by the Municipal Assembly, rests absolutely in the discretion

[1] 61 Mo. 31-2.

[2] Cooley's Const. Lim. (5th ed.), p. 712.

[3] *Supra*, pp. 21-23; Pr. Rec., pp. 52-55.

of that body; but if granted, such corporation must still fulfil the conditions prescribed in Section 612.

This is not regulating the exercise of a corporate franchise, but denying it altogether except at the mere will of the municipality; which thus assumes the power, if it choose, to repeal the grant and violate the contract made by the State. And the ordinance is so drawn, that to enforce it at all, this assumed right of the municipality must be insisted on, for it is a condition precedent to all that follows.

Said ordinance then provides (Section 604) that all such wires, etc., along or across any street, etc., "shall be placed at such distances above or below the surface of the ground, and secured in such manner *as shall be prescribed by the Board of Public Improvements;*" and further (Section 605) that any corporation *duly authorized by ordinance to do business in the City of St. Louis* and desiring to place such wires, etc., shall file in the office of the Board of Public Improvements an application and plat showing the route thereof and the manner of supporting, etc., the same; and (Section 606) that upon these being filed, the Board of Public Improvements is authorized to grant a permit for such occupancy of the streets, etc., "*with such restrictions, regulations and qualifications as may be prescribed by said board*, and under the supervision and to the satisfaction of the Supervisor of City Lighting."

Sections 607 to 611 relate exclusively to overhead wires, to be strung on poles, and are irrelevant here.

Section 612 contains the further conditions above referred to, presently noticed.

These sections, it will be observed, prescribe no regulations whatever as to the manner in which *underground* electric wires shall be laid, supported or secured. The only regulations provided for are those which the Board of Public

Improvements is *authorized* — not required — to prescribe for the government of any such corporation, when it shall have filed in the office of the Board of Public Improvements an application and plat such as required. But said Board is not authorized to grant any such permit or prescribe any such regulations, in respect of any corporation which has not previously been authorized by ordinance to do business in the city. It thus appears (if said ordinance be valid), that relator's right to exercise its corporate franchise in question, absolutely depends, not only upon the consent of the Municipal Assembly, but upon the consent of the Board of Public Improvements, and upon its compliance with regulations to be prescribed, not by ordinance, but by the Board of Public Improvements, and to be fulfilled to the satisfaction of the Supervisor of City Lighting.

But this is not all. If this ordinance is valid, relator must still (Sec. 612)[1] "before availing itself of any of the rights or privileges granted by this article,"—

(1) File with the City Register *an acceptance of all its terms*,— thereby acknowledging the unqualified right of the city to permit or prohibit the exercise of its charter right — and must agree therein

(2) To file with the City Comptroller semi-annually sworn statements of its gross receipts: and

To pay to the City Treasurer, an annual tax of *five per cent of its gross receipts:*

(3) Also file with the City Register its bond in $20,000 with two sureties to be approved by the Mayor and Council, conditioned

To comply with all the conditions of this ordinance or *any ordinance which may hereafter be passed* regulating the placing of underground wires, etc., and

To comply *with all regulations made by the*

[1] *Supra*, p. 22.

Board of Public Improvements in reference to the subject of said article, and

To make the statements and payments required as above, and to indemnify the City of St. Louis from all cost, damage, etc., by reason of the exercise of any of the privileges granted by said article *or any ordinance which may hereafter be passed* relating to the subject-matter thereof.

And by Section 613, for any failure to comply with any provision of said article, not only relator, as a corporation, but its President, Manager, Superintendent or other officer, is declared guilty of a misdemeanor and liable to a fine not to exceed $500.

It is clear that this ordinance must stand or fall as a whole. If it be valid, relator is absolutely prohibited from exercising the franchise, claimed under its charter, to make and vend electric light, as a substitute for gas light, and "*to that end* to lay down all pipes, fixtures or other thing properly required therefor," unless it shall *first* obtain authority to do so from the Municipal Assembly, and *second*, obtain a permit from the Board of Public Improvements in the manner required, and *third*, comply with all the regulations which said Board may now or at any time hereafter prescribe, to the satisfaction of said Board and of the Supervisor of City Lighting, and *fourth*, file with the City Register (1) its acceptance and agreement and (2) its bond in $20,000, such as prescribed in Section 612, — each and all of which conditions must be fulfilled by relator "before availing itself of any of the rights and privileges granted by this article."

It is equally clear, if we assume (as assumed by the court below)[1] that relator is "an existing corporation, possessing all the powers, rights and privileges its charter

[1] *Supra*, p. 30: Pr. Rec., p. 41.

purports to confer upon it," that the question of the affirmance by this Court of the judgment below, turns exclusively upon *the validity of this ordinance*, as against relator. It is averred, and admitted by respondents' demurrer, that no other ordinance of said city purports to prescribe any regulation or condition in respect of the laying of underground electric wires;[1] also[2] that the refusal of respondent Murphy, Street Commissioner, to permit plaintiff to excavate in any street of said city for any purpose, or to issue a permit therefor, was not upon the alleged ground, nor in fact for the reason, that by laying its wires underground in the manner by it proposed relator would cause any inconvenience to the public, but was an unconditional refusal; and such refusal is justified by the return of both respondents upon the sole ground, so far as the city is concerned,[3] that *said ordinance is valid*, and that the relator had never accepted nor complied with its conditions, "*nor has it ever been authorized by the Municipal Assembly of St. Louis to place its wires, tubes or cables under the streets or alleys of St. Louis.*" Upon this defense alone the court below based its judgment, saying:[4]—

As the case is now presented we must hold that the city, under its power to regulate the use of streets, and under its general police power, has the right to require a compliance with regulations which either *wholly prohibit relator from laying its wires under the streets* or which regulate the manner in which it may be done. Respondent under his official duties as Street Commissioner, properly refused to grant the permit demanded unless relator first complied with the requirements of the valid ordinances then in force.

[1] *Supra*, p. 21: Pr. Rec., p. 51.
[2] *Supra*, pp. 10, 24: Pr. Rec., pp. 9, 22, 56.
[3] *Supra*, pp. 13–14: Pr. Rec., p. 28.
[4] *Supra*, p. 35: Pr. Rec., p. 44.

It only remains, therefore, to consider whether *this ordinance* is valid, as against relator's charter rights. And for the purpose of that inquiry, the only question prescribed by this record is, we submit:—

Whether the City of St. Louis, either under its charter power to regulate the use of streets, or under its general police power, can prohibit and prevent relator from exercising the corporate franchise in question, unless it shall first comply with *the conditions prescribed in that ordinance*, without impairing the obligation of the contract contained in relator's charter?

Whatever its charter powers may be in that regard, the City of St. Louis has undertaken by that ordinance alone to exercise them: and if, as against relator's charter rights, it has exceeded those powers, that ordinance cannot lawfully be enforced, and the judgment of the court below should be reversed.

VIII.

*The Charter of St. Louis (Article III, Section 26, Paragraph 2), empowers the Mayor and Assembly, "by ordinance not inconsistent with the constitution or any law of this State or its charter * * * to construct and keep in repair all bridges, streets, sewers and drains and to regulate the use thereof." This power must be exercised by ordinance. The ordinance in question does not contain, but authorizes the Board of Public Improvements to prescribe, regulations as to the placing and securing of underground wires. Even if the city had power, under its charter, to regulate or control the exercise of relator's charter rights, it can not delegate that power to the Board of Public Improvements. Said ordinance, so far as it relates to underground wires, is void.*

The first condition prescribed by said ordinance is that relator shall have been authorized by the Municipal Assembly to lay its wires underground. The next is that it shall obtain a permit from the Board of Public Improvements, in the manner prescribed, "with such restrictions, regulations and qualifications as may be prescribed by said Board." The ordinance itself prescribes no regulations as to the manner of laying underground wires.

The validity of the first condition will be considered presently. The second is justified as an exercise of the city's charter power "to regulate the use of streets." But that power, by the charter of St. Louis,[1] is intrusted only to the Mayor and Assembly, to be exercised by ordinance. This ordinance contains no regulations as to the manner of laying wires underground. By it, the Mayor and Assembly have not exercised that power, but have attempted to delegate it to the Board of Public Improvements. To that extent, without reference to relator's charter rights, the ordinance is void.

"The principle is a plain one" (says Judge Dillon)[2] "that the public powers or trusts devolved by law or charter upon the council or governing body to be exercised by it when and in such manner as it shall judge best, *cannot be delegated to others.*"

This doctrine has been affirmed by the Supreme Court of Missouri in many cases. In *Ruggles* v. *Collier* (1869),[3] that court said:—

"There is a clear distinction to be observed between legislative and ministerial powers. The former cannot be delegated; the latter may. Legislative power implies

[1] Art. III, Sec. 26, Par. 2: 2 Rev. Stat. Mo. 1889, p. 2096.
[2] 1 Dillon Mun. Corp. (4th ed.), p. 154, Sec. 96.
[3] 43 Mo. 353.

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judgment and discretion upon the part of those who exercise it, and a special confidence and trust upon the part of those who confer it."

In that case, the St. Louis charter empowered the city council, whenever they should deem it necessary, or upon the petition of a majority of abutting owners, to cause the repaving of any street or portion thereof. An ordinance empowering the Mayor to repave the streets in a designated district with wooden pavements "wherever and whenever he shall deem it necessary," was held void as an unlawful delegation of power.

On the same ground city ordinances were held void in the following cases:—

St. Louis v. *Clemens*,[1] because the dimensions of a sewer were left to the city engineer, when the charter required sewers "to be of such dimensions as prescribed by ordinance." Said the court:—

"The rule is well settled that corporations are the mere creatures of the law, established for special purposes and deriving all their powers from the Acts creating them. The corporate acts must not only be authorized by the charter, but these acts must be done by such officers or agents and in such manner as the charter directs (citing numerous cases). The ordinance conferring the authority on the engineer was not in legal conformity with the charter, and must be disregarded."

Thompson v. *Boonville*;[2] City council cannot delegate to a committee its power to fix the grade of a street.

Matthews v. *Alexandria*;[3] nor to the Mayor power to fix wharfage rates.

St. Louis v. *Russell*;[4] nor make the erection of a livery

[1] 43 Mo. 395.
[2] 61 Mo. 282.
[3] 68 Mo. 115, 119.
[4] 116 Mo. 248, 255-7.

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stable dependent upon the consent of neighboring owners (citing *Ruggles* v. *Collier* and many other cases).

City of Nevada v. *Eddy*;[1] power of city council to improve street by *ordinance* cannot be exercised by *resolution*.

So, in *Birdsall* v. *Clark*,[2] affirming *Thompson* v. *Schermerhorn*,[3] the charter of Binghampton authorizing the common council, by contract or otherwise, to cause sidewalks to be built, that body passed a resolution directing the superintendent of streets, when the owner failed to do such work within the time limited, "to cause the same to be done;" which, on like grounds, was held void.

It is too plain for argument, under these decisions, that the framing of proper regulations as to the manner of laying underground electric wires, such as contemplated by the ordinance in question, is not a merely ministerial duty, but would require the exercise of legislative discretion. It cannot, therefore, be delegated by the Mayor and Municipal Assembly of St. Louis to the Board of Public Improvements. On that ground, aside from any other objection, the ordinance in question is void.

It does not appear from this record that any regulation as to the laying of underground wires was prepared, or prescribed to relator, even by the Board of Public Improvements; nor that said board could reasonably have required relator to lay or secure its wires in any other manner than that proposed by it. That method is not only described, but is averred,[4] and admitted by respondents' demurrer, to be practicable, of the most approved description, such as used for like purposes in other cities, offering no obstruction whatever to the use of the streets for travel

[1] 123 Mo. 546, 557-9.
[2] 73 N. Y. 73, 76-7.
[3] 6 N. Y. 92.
[4] *Supra*, pp. 9, 20: Pr. Rec., pp. 21, 50-1.

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or traffic, and avoiding entirely the danger to life and property which attends the use of overhead electric wires such as relator is now using under contract with said city.

Upon the facts presented by this record, therefore, not only has relator fulfilled the sole condition annexed by the State to its corporate franchise, but no reasons exists, so far as relator is concerned, for any exercise by the city of any charter power or police power in this regard. Whether exercised by the State, or by a municipality, those powers exist solely for the protection of the community, and to prevent the wrongful or injurious use by any member of the community of any property or right which he may possess. When no wrong is threatened, when every duty is fulfilled, and every safeguard is provided, no further regulation is required.

IX: X.

Said ordinance is void, as against relator, because, under color of the charter power of the city, by ordinance, to regulate the use of streets, it absolutely prohibits the exercise by relator of corporate franchises essential to the conduct of its business and expressly granted to that end, except with the city's consent.

For like reasons, said ordinance is not valid as a police regulation. The city cannot, under color of its police power, deprive relator of any of the essential rights and privileges which its charter confers. Such regulations to be valid, must be police regulations in fact, and not amendments of the charter, or curtailment of the corporate franchises.

As above shown, this ordinance prescribes no regulation as to the manner of laying wires underground, and the attempted delegation to the Board of Public Improvements of the power to make such regulations, is void. It is not,

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therefore, an exercise of the city's power to regulate the use of streets.

So far from regulating the use of streets, it absolutely prohibits relator from exercising its corporate franchise of carrying on the lighting business, except by permission of the Municipal Assembly, to be granted or withheld at their arbitrary will. Relator's charter, as above contended, empowers it to make and vend electric light, and "*to that end* to establish and lay down all pipes, fixtures and other thing properly required therefor." This, as above shown, is a corporate franchise, granted by the State upon the sole condition that such pipes, etc., shall be laid with as much dispatch and as little inconvenience to the public as possible. The pleadings admit that relator is ready and has offered to comply with this condition; that pipes or conduits under the streets for carrying suitable wires for that purpose are not only "a thing properly required" but necessary therefor; and that the manner in which relator proposes to construct such conduits and lay such wires therein fulfils not only the sole condition annexed by the State to its grant, but every other condition requisite to the safe and convenient use of the public streets. Yet the City of St. Louis insists that unless relator shall obtain the consent of the Municipal Assembly, and also fulfill other onerous conditions above mentioned, it shall not exercise that franchise, and to that extent shall not carry on the business for which it was incorporated by the State. But if the city can thus prevent relator from making and vending electric light, it can equally prevent it from making and vending gas light, and from laying gas pipes in the street — in short, from carrying out the essential objects of its incorporation.

Neither the charter power to regulate the use of streets, nor the general police power of the city justifies this denial to relator of a right granted to it by the State, by a

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contract not subject to alteration or repeal. To prohibit the exercise of the right, is not to regulate it.

In *St. Louis* v. *Western Union Telegraph Co.*,[1] the power of the City of St. Louis to regulate the use of its streets, under its present charter, was considered. It was held that under the charter of 1875, the city has a very enlarged control over property devoted to public uses within its limits, including the right to regulate the use of the streets. Said the Court:—

"If the city gives a right to the use of the streets or public grounds, as it did by Ordinance No. 11,604, it simply regulates the use when it prescribes the terms and conditions upon which they shall be used. * * * *Unless, therefore, the Telegraph Company has some superior right which excludes it from subjection to this control on the part of the city over the streets*, it would seem that the power to require payment of some reasonable sum for the exclusive use of a portion of the streets was within the grant of power to regulate the use. That the company gets no such right from the General Government, is shown by the opinion heretofore delivered, *nor has it any such from the State*."

To the contention of the Telegraph Company that the General Assembly had absolute power over the city streets, the Court replied:[2]—

"Counsel also refer to the case of *Atlantic & Pacific Railroad* v. *St. Louis*, 66 Missouri, 228, but there is nothing in that case which throws any light upon this. In that it appeared that there was an act of the legislature giving to the railroad company a specific right in respect to the construction of a track within the city limits, and it was held that the company was entitled to the benefit of that act, and to claim the right given by the general assembly,

[1] 148 U. S. 103 (s. c., 149 U. S. 469-471).
[2] p. 471.

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although it had after the passage of the act proceeded in the construction of the track under an ordinance of the city purporting to give it the privilege. But, as we have seen, the act of November 17, 1855, vested in defendant no general and irrevocable power to occupy the streets in any city in the State through all time. We find nothing, therefore, in the cases cited from the Missouri courts which militates with the conclusions we have drawn as to the power of the city in this respect."

But relator's charter, as above contended, does contain an express and irrevocable grant[1] from the State of the specific right and corporate franchise here in question. The condition annexed to that grant — "the same to be done with as much dispatch and as little inconvenience to the public as possible" — was an exercise by the State itself of its paramount right to "the absolute control of the streets in cities and other highways," which the Supreme Court of Missouri affirmed in the case referred to.[2] Unquestionably, relator must fulfill that condition, and its readiness to do so is admitted by the pleadings in this cause. In what manner, or by whom, if it refused to do so, that duty should be enforced, is a question which does not arise on this record. By the ordinance here in question, as above shown, the city is not regulating, but prohibiting, the use of the streets by relator for laying underground wires, except upon conditions which cannot be reconciled with the enjoyment by relator of the grant from the State. Relator cannot fulfill those conditions without virtually surrendering its franchise of occupying the streets for the purposes of its business, equally for laying gas pipes as for laying electric wires underground.

Said ordinance also requires, under color of regulating the use of the streets, the payment by relator of an annual

[1] State *ex rel.* City of St. Louis *v.* Laclede G. L. Co., 102 Mo. 484–6.
[2] Atlantic & Pacific R. R. Co. *v.* St. Louis, 66 Mo. 256.

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tax of *five per cent. on the gross receipts from its business.* This condition is void, because (1) it annexes to the enjoyment of relator's corporate franchises a condition not required by the State, and inconsistent with the grant, and (2) if regarded as compensation for the use of the streets, it is an unreasonable demand.

In the *Western Union Telegraph case*, *supra*, this Court, while holding that the city might, under the power to regulate the use of the streets, require the Telegraph Company to pay for the privilege of erecting its poles, nevertheless held [1] that "all that it can insist upon is, in this respect reasonable compensation for the space in the streets thus exclusively appropriated." On its face, a tax of five per cent. upon relator's gross receipts from its business is exorbitant and unreasonable compensation for the privilege of laying, under the surface of a public street, a conduit thirty inches wide, which, as the pleadings admit,[2] will offer no obstruction whatever to the use of the streets for travel or traffic. But any such tax is unlawful, since relator has the right, under a grant from the State, without any such condition, to so occupy the street. "The power to tax is the power to destroy." If the city can tax relator five per cent for the privilege of doing business, it can equally well tax it seventy-five per cent. If the tax is for revenue purposes, it is not a regulation of the use of the streets, nor a police regulation. If, as we insist, it diminishes to that extent the value of relator's franchises, then it impairs the obligation of the contract of the State.

In *Mayor, &c.*, v. *Second Avenue R. R. Co.*,[3] the New York Court of Appeals held void an ordinance which, under color of regulating a street railroad company, imposed an annual license tax of $50 per car. The city had previously granted to the company permission to construct and operate

[1] 148 U. S. 105. [2] *Supra*, p. 20. [3] 32 N. Y. 261.

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its railroad, but undertook subsequently to impose this tax. The court held that it was not a regulation, but "the imposition of an annual tax upon the company in derogation of its rights of property, and on that account is unlawful and void."

This ordinance, and the conditions imposed by it, cannot be upheld as police regulations. This Court, while steadfastly upholding the legitimate exercise by the States of the police power reserved to them, has uniformly insisted that no State, much less a municipality, under color of that power, can impair rights protected by the Federal Constitution.

In *New Orleans Gas Co.* v. *Louisiana Light Co.*, *supra*, this Court further said:[1] —

"Definitions of the police power must, however, be taken subject to the condition that the State cannot, in its exercise, *for any purpose whatever*, encroach upon the powers of the General Government, *or rights granted or secured by the supreme law of the land.*"

In the recent case of *Gulf, &c., R. R.* v. *Hefley*,[2] the same doctrine is affirmed, citing other cases to like effect.

In *Mugler* v. *Kansas*,[3] this Court sustained the Kansas Prohibition Law, as within the police powers of the State, holding that it belonged to the legislative department to exert those powers —

"— and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health or the public safety."

But the Court further said:—

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted

[1] 115 U. S. 650, 661. [2] 158 U. S. 104-5. [3] 123 U. S. 623.

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as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. * * * If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, *or is a palpable invasion of rights secured by the fundamental law*, it is the duty of the courts to so adjudge and thereby give effect to the constitution."

The same doctrine has been repeatedly affirmed by the Supreme Court of Missouri. In *State ex rel.* v. *Greer*,[1] affirming *Sloan* v. *Pacific Railroad*,[2] that court said:—

"This term, police, is a very indefinite one. Perhaps Judge Cooley's definition may be considered as exact a one as we shall find. 'Police regulations,' says the author,[3] 'must have some reference to the comfort, safety or welfare of society; they must not be in conflict with any of the provisions of the charter; *and they must not, under pretense of regulation, take away from the corporation any of the essential rights and privileges which the charter confers.* In short, they must be police regulations in fact, and not amendments of the charter, or curtailment of the corporate franchise.'"

In *State ex rel.* v. *Corrigan St. Ry. Co.*,[4] affirmed in *City of Kansas* v. *Corrigan*,[5] the city of Kansas had granted to a street railway company the right to maintain a horse railroad in various streets in that city for twenty years. By a later ordinance, it undertook to impose on the railway company, without its consent, an additional obligation to pave the street; and this was defended as an exercise of the city's police power, and its power to regu-

[1] 78 Mo. 194–5.
[2] 61 Mo. 31–2.
[3] Cooley's Const. Lim. (5th ed.), p. 712.
[4] 85 Mo. 263, 282.
[5] 86 Mo. 67, 70.

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late the use of streets. But the court held the ordinance void on the ground that the former ordinance, granting the right to build and operate the railway, which was accepted and large sums of money expended on the faith of it, was a contract by the city with the railway company, which it could not lawfully impair. Said the court :[1]—

"If any one thing is guarded in the law more particularly than another, it is the inviolability of a contract, and all attempts to impair such obligations, under whatever guise they are made, whether directly or indirectly, must prove abortive. *State ex rel.* v. *Miller*, *66 Mo. 329; *State* v. *Miller*, 50 Mo. 129; *Hovelman* v. *K. C. Horse Railroad Co.*, 79 Mo. 632."

In the case at bar, the city disregards the obligation of a contract made by the State, and whose inviolability is protected by the national constitution.

We repeat that the State itself, in granting its corporate franchises to relator, prescribed the conditions upon which they should be held and enjoyed. The State itself, having "absolute control over streets in cities," [2] undertook in this instance to regulate the use of the streets, by expressly empowering relator not only to carry on a lighting business, but "*to that end* to establish and lay down all pipes, fixtures or other thing properly required therefor, the same to be done with as much dispatch and as little inconvenience to the public as possible." It is not claimed that this condition has been or will be violated by relator. The contrary is admitted by these pleadings, and the ostensible requirement of the city ordinance in that regard is thus fulfilled. In fact, the city by that ordinance, has not really attempted to *regulate the use* of the streets. It has prescribed no regulation whatever as to the manner in which relator's

[1] 85 Mo. 282.

[2] Atlantic & Pacific R. R. Co. *v.* St. Louis, 66 Mo. 288.

wires shall be laid, or the safety or convenience of the public protected. It is simply an attempt by the city to repeal and nullify the grant by the State, and to subject relator, the conduct of its business, and the enjoyment of its franchises, to its own absolute control.

In *Citizens St. Ry. Co.* v. *Memphis*,[1] the U. S. Circuit Court enjoined the city of Memphis from obstructing the plaintiff in operating its railway on a city street; on the ground that the company having acquired that right by grant from the State, the city could not, under color of regulating the use of the street, obstruct or prohibit its exercise. Said the court:—

"Regulation cannot be enlarged into a power of prohibition, nor under it can the city usurp the State power of creating franchises or taking them away. If it has such power of creation or withdrawal, independently of the power of regulation and control, the grant of it is as to this plaintiff company, null and void. The plaintiff company can be deprived of its right to use any or all the streets only by its own consent, express or implied."

Other cases, cited in our brief, sustain the views above presented. It is respectfully submitted that the final judgment below was rendered under circumstances which perhaps precluded the court from giving due weight to these considerations. As the record shows,[2] the opinion on file was rendered after the argument of relator's demurrer to respondent's return. The city ordinance in question was only in part set forth in that return; besides which, the new matter averred in relator's reply, which respondents' demurrer admitted to be true, materially changed the aspect of the case. But the court, without further argument, rendered final judgment "for the reasons heretofore given in the opinion in this cause."

[1] 53 Fed. Rep. 715, 732.

[2] Pr. Rec., p. 40; *supra*, pp. 2, 29.

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But this opinion, while assuming the validity of relator's charter, does not discuss the vital question, whether the ordinance relied on, in virtue of the power to regulate the streets and the police power, did not transcend the admitted constitutional limits of those powers; nor whether the Assembly had not by said ordinance attempted to delegate to the Board of Public Improvements the powers which itself alone could exercise, and only by ordinance; nor whether the method of laying its wires, proposed by relator, did not fulfill, not only the condition prescribed by the State, but all that the city had lawful right to demand; nor whether the tax imposed by said ordinance was a reasonable or lawful condition of the exercise by relator of its corporate franchise. All these questions arose on the averments in relator's reply, but they do not appear to have been fully considered by the court below.

The opinion states, without qualification,[1] that — "The art of producing light by electricity was wholly unknown to science at the time the franchise was granted to relator." Hence it is inferred that, conceding that under the general words used in its charter relator is authorized to use electricity for lighting purposes, yet it does not follow that it has the right "to adopt its own methods for exercising that power, regardless of the paramount rights of the public to the use of the streets."

The court below, in adhering to this position, would seem to have overlooked the express averment in relator's reply,[2] admitted by respondents' demurrer to be true, that before March 2, 1857, electricity had been used for illuminating purposes and the electric light publicly exhibited to great numbers of persons. It may be assumed, perhaps, that on more mature consideration, and by availing itself of the methods of refreshing the judicial memory

[1] *Supra*, p. 33: Pr. Rec., pp. 42–3. [2] *Supra*, p. 27: Pr. Rec., p. 58

suggested by this Court in *Brown* v. *Piper*,[1] cited and approved by the court below in *State* v. *Hayes*,[2] a different conclusion might have been reached.[3] Moreover, the charter grant of power, not only to use for lighting purposes "any substance or material that may be now or hereafter used as a substitute" for gas or gas light, but also "*to that end*, to establish and lay down *all pipes, fixtures or other thing properly required therefor*," certainly must be held to entitle relator, if it may use electricity instead of gas for lighting purposes, to lay pipes or conduits for electric wires as well as for gas pipes, provided always, of course, "the same be done with as much dispatch and as little inconvenience to the public as possible."

We respectfully submit that the general words of the charter admit of no distinction between the two; nor is there any reason, so far as the safety of the public or the use of the streets is concerned, why any such distinction should be made. On the contrary, it is matter of common knowledge, it is expressly averred by relator, admitted by respondents, and assumed by the Court below, that the notorious danger attending the use of overhead electric wires would be entirely avoided by placing them underground. The opinion itself states:—

"It is a matter of public notoriety that the question is now being considered whether it would not be necessary in the interest of public safety as well as convenience that these wires should be placed underground, so as to thereby leave the streets safe and unobstructed."

For that reason, in part, relator's petition avers that it desires to exercise its corporate franchise of placing these wires underground, thereby dispensing with the overhead wires by means of which, under contract with the city of St. Louis, it is now lighting the public streets.

[1] 91 U. S. 37. [2] 78 Mo. 318. [3] *Supra*, pp. 98–100.

It is suggested by the court below [1] that there may be other companies now using electric wires for lighting and other purposes: and that,

"To accommodate them all, to prevent monopolies and to regulate the use of the streets, it seems absolutely necessary that the municipal authorities should have the right to direct the manner in which wires should be placed underground."

No such averment by the City of St. Louis or its Street Commissioner appears in this record. It will hardly be contended that the City of St. Louis could lawfully deprive relator of corporate franchises secured to it by an inviolable contract of the State, in order to accommodate other companies desiring like privileges.

As was held by this Court in *Louisville Gas Co.* v. *Citizens G. L. Co.*,[2] the propriety of making that contract, under the circumstances then existing, "was a matter for legislative determination, behind which the courts should not attempt to go." But this record presents no question of monopoly or exclusive right, and relator's averment as to the manner in which it proposes to lay its wires underground, in a space thirty inches wide, is a sufficient answer to any such suggestion.

It was contended by respondents' counsel below, and the suggestion appears to have made some impression on the court,[3] that relator, in virtue of the authority granted to it by Section 1 of the Act of March 26, 1868,[4] to lease or dispose of any portion of its franchises to other individuals or corporations, could practically control the streets and deprive the city of the power to regulate their use.

[1] Opinion, *supra*, p. 35: Pr. Rec., p. 44.
[2] 115 U. S. 698–9.
[3] Opinion, *supra*, p. 35: Pr. Rec., p. 44.
[4] *Supra*, p. 7: Pr. Rec., p. 7.

COPY BOUND

This contention amounts simply to a denial of the validity, or the expediency, or both, of the grant to relator of the right to assign its franchises. But if the legislature had power to grant, and did grant those franchises to relator, its power to make them assignable cannot be denied. The expediency, under the circumstances existing at the date of the charter, either of granting such franchises or of permitting them to be subsequently assigned, was (as held by this Court in *Louisville Gas Co.* v. *Citizens' G. L. Co.*),[1] "a matter for legislative determination, behind which the courts should not attempt to go." Any assignee of those franchises would necessarily take them subject to every condition and obligation under which the relator held them, express or implied, whether contained in the charter or arising from the nature of the *quasi*-public duties to be fulfilled thereunder. The assignee would simply stand in the shoes of the relator, and no assignment could in any manner imperil the rights, the convenience or the safety of the public.

But such a contention would not be warranted either by anything in the record or by any fact outside of it. The refusal of the city and its Street Commissioner to permit relator to exercise its charter rights, was not based on any such ground, and the decision of the court below [2] was based exclusively upon relator's not having complied with the requirements of the ordinance set out in the pleadings. It is not claimed that relator has in any manner disposed of or parted with, or has any purpose of parting with, any part of its franchises. The purpose of this proceeding, on the contrary, is to enforce its own right to exercise them under and in accordance with its grant from the State, by laying under a very small portion of the streets in the most approved and practicable manner, the wires which it desires to use for carrying on its own lighting business.

[1] 115 U. S. 698–9.

[2] *Supra*, p. 35: Pr. Rec., p. 44.

CLOSE IN CENTER

The only questions before this Court are, whether relator possesses the charter rights which it claims, and if it does, whether the city of St. Louis, on the pretext that it desires to promote the public safety and convenience, can lawfully prevent relator from exercising those rights in a manner which, as admitted on this record, will avoid not only all obstruction to travel and traffic, but also the dangers attending the method of electric lighting which relator is now using and is under obligation to use, by contract with the City of St. Louis itself.

XI.

Relator having applied to the Street Commissioner of the City of St. Louis for a permit to excavate Broadway, in pursuance of its charter rights, in order to do the same with as much dispatch and as little inconvenience to the public as possible, it was his duty to grant such permit; which being refused, mandamus is the proper remedy.

Neither in the pleadings nor in the argument below was any question made of the propriety of this proceeding for the purpose intended. If there were occasion to remind this Court of the office of the writ of *mandamus*, pertinent authorities on that point are cited in our brief.[1] The respondent Murphy, as Street Commissioner of the City of St. Louis, is a ministerial officer, charged by the charter of St. Louis with the supervision and control of the streets. By ordinance, no excavation can be made in any street except upon a written permit from him. Relator applied for such permit, in order to comply with the condition of its charter, that it should exercise the franchise in question "with as much dispatch and as little inconvenience to the

[1] *Supra*, p. 48.

public as possible." Assuming that relator possesses the charter rights it claims, it was the duty of the Street Commissioner to grant such permit; which being refused, *mandamus* is the proper remedy.

St. Louis Charter, Article IV, Sec. 35 (II Rev. Stat. Mo., 1889, p. 2109);
Rev. Ord. St. Louis (1887), Art. I, Chap. 15, Sec. 568;[1]
High, Extr. Legal Remedies, Sec. 324;
1 Dillon Mun. Corp., §§ 827–8;
State *ex rel. v.* State Board of Health, 103 Mo. 29;
State *ex rel. v.* Tracy, 94 Mo. 217.

HENRY HITCHCOCK,
of Counsel for Plaintiff in Error.

[1] *Supra*, p. 9.

No. 667, Brief for Pl'ff
Brief of Lionberger for Pl'ff in Error

FILED
DEC 30 1895
JAMES H. McKENNEY, CLERK

2

BRIEF FOR PLAINTIFF IN ERROR.

Filed Dec. 30, 1895.

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE STATE OF MISSOURI EX REL. THE LACLEDE GAS LIGHT CO.,
PLAINTIFF IN ERROR,
vs.
MICHAEL J. MURPHY, STREET COMMISSIONER OF ST. LOUIS, AND THE CITY OF ST. LOUIS.
No. 667.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

BRIEF AND ARGUMENT OF
ISAAC H. LIONBERGER,
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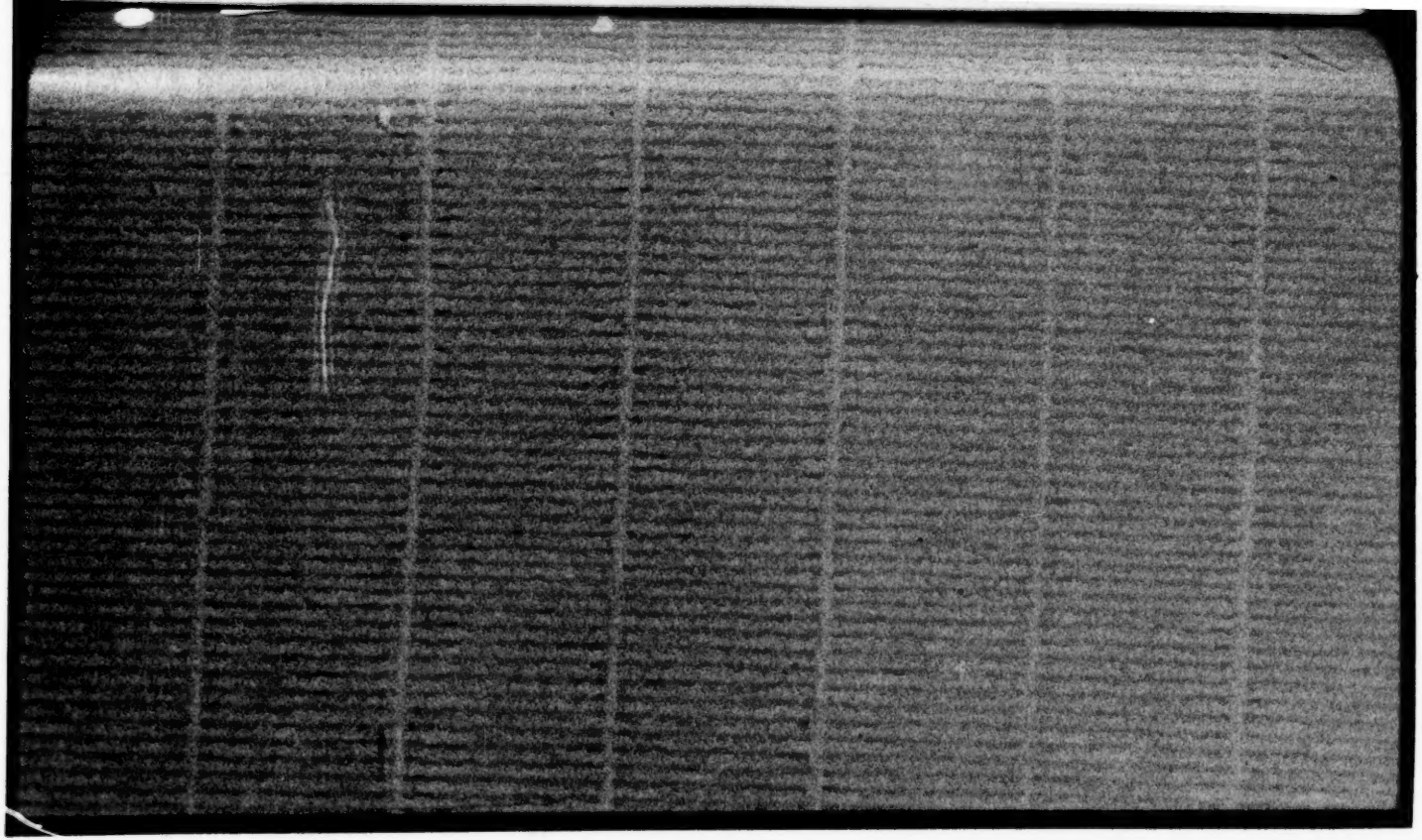
Nixon-Jones Printing Co., 315 Pine St., St. Louis.



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IN ERROR TO THE SUPREME COURT OF MISSOURI.

STATEMENT.

Petition. The plaintiff in error avers that it is a corporation organized and existing under certain acts of the legislature of Missouri, which constitute its charter; that by said charter it is authorized and empowered to light the city of St. Louis forever, and to make and vend gas, gas-lights and gas-fixtures, and any substance or material that

may now or hereafter be used as a substitute therefor, throughout the limits of the city of St. Louis; and to that end to establish and lay down in any portion of the corporate limits of said city all pipes, fixtures, or other thing properly required in order to do the same, and to have all other powers necessary to execute and carry out the privileges and powers granted.

That plaintiff proposes to lay down in a part of Broadway, a street of said city, wires for the transmission of electricity to be used for furnishing electric light to said city and its inhabitants; and that the defendants in error, the City of St. Louis and its Street Commissioner, refuse to allow said street to be excavated for such purpose (Trans., pg. 4).

Return. The defendants in error deny the corporate existence of the plaintiff and allege that its corporate powers and privileges ceased March 2, 1887. They also deny that the charter of plaintiff conferred upon it the right to vend electricity, and affirm that electricity is not a substance or material within the meaning of said charter.

They aver further that the Revised Ordinances of the city of St. Louis, as amended by Ordinance 16,897, prohibit the placing of wires, tubes or cables conveying electricity for the production of light, heat or power, along or across any of the streets of St. Louis, by any person who has not accepted and complied with the provisions of said Revised Ordinances, or been authorized so to do by the Municipal Assembly; and that plaintiff has neither accepted or complied with said Revised Ordinances, nor been authorized to lay wires by the Municipal Assembly (Trans., pg. 24).

Answer. The answer of plaintiff to the return of defendants avers that electricity is a substance or material within

the meaning of the charter, and the use of it for lighting was well known to art when the plaintiff's charter was granted; but whether such be the fact or not is immaterial because electric lights, being carbon filaments or pencils rendered incandescent by electric currents, are substances and materials in as true a sense as carbon in gas, made incandescent by combustion.

Plaintiff further avers and shows that the Ordinance of St. Louis relied on by defendants impairs the obligation of plaintiff's contract with the State in the following particulars, and is therefore in conflict with section 10 of article 1 of the constitution of the United States.

First. It prohibits the plaintiff from doing what its charter says it may do, unless the consent of the Municipal Assembly be first obtained; and the Municipal Assembly of St. Louis refuses such consent.

Second. The ordinance prohibits plaintiff from doing what its charter says it may do, unless plaintiff will agree in writing to pay and pay five per centum of its gross receipts into the city treasury (Trans., pg. 46).

Demurrer. The defendants demur to the answer on the ground that its allegations do not entitle the plaintiff to the relief prayed for (Trans., pg. 58.)

Decision. The Supreme Court of Missouri, while assuming for the purposes of its decision that the charter of plaintiff is a valid and subsisting contract with the State, and that the legislature of the State had, when the contract was made, supreme control over the streets of St. Louis, decides that the charter of the city adopted in 1875 pursuant to the constitution of the State, confers upon the city the power to regulate the use of its streets; that an ordinance which wholly prohibits the laying of wires under ground is a valid exercise of the police power conferred

upon the city; and that since it appears from the record that plaintiff is now suffered to maintain an overhead system of poles and wires, such ordinance does not impair the obligation of its contract with the State. The opinion also intimates that plaintiff's charter, properly construed, does not confer upon it the right to vend electricity (Trans., pg. 37).

Questions. The questions now presented for consideration are as follows:—

1. Has this Court jurisdiction to review the decision of the Supreme Court of Missouri?

2. Are the acts which constitute the charter of plaintiff valid enactments?

3. Does such charter confer upon the plaintiff the right to furnish light to the city of St. Louis and its inhabitants by means of electricity, and for that purpose to lay down in the streets of said city pipes or conduits for the conveyance of wires?

4. Does the ordinance of the city, relied upon by the defendants, impair the plaintiff's contract with the State?

ASSIGNMENT OF ERRORS.

The Supreme Court erred in overruling relator's demurrer to respondent's return.

And the said court erred in overruling relator's motion to strike out portions of respondent's return.

And the said court erred in sustaining respondent's demurrer to relator's traverse and reply to respondent's return.

And said court erred in entering final judgment for respondents on the pleadings in this cause.

And said court erred in denying to relator the writ of mandamus prayed for in its petition in this behalf.

And the court erred in deciding that the ordinance of the city of St. Louis pleaded by respondents, and which is fully set out in relator's reply, is a valid ordinance and binding upon relator, and in deciding that said ordinance does not impair the obligation of a contract between relator and the State of Missouri, and does not impair the vested rights of relator under its charter and the franchises granted to it by the State of Missouri prior to the enactment of said city ordinance.

And said court erred in deciding that said ordinance of the city of St. Louis was a lawful exercise of the police power and binding as such on relator, and that relator was subject to all the provisions and requirements of said city ordinance in the conduct of its business, and that it was

bound to accept the same with all its provisions and conform to all its requirements before using the streets of said city for laying its wires beneath the surface of the streets for the purpose of conducting electricity through the city of St. Louis for illuminating purposes.

And said court erred in holding that the art of producing light by electricity was wholly unknown to science at the time the charter and franchise were granted to relator.

BRIEF.

I.

This court has jurisdiction to review the record and decision below. The plaintiff in error asserts certain charter privileges. The validity and effect of the charter, and the validity of a subsequent law which impairs the obligation of the charter, are directly drawn in question. The decision of the court below was in favor of the validity of the ordinance. *Post*, pg. 9.

Sec. 10, Art. 1 of the United States;
Sec. 709, of the Rev. Stats. of the U. S.;
Mobile & Ohio R. R. Co. *v.* Tennessee, 153 U. S. 486.

II.

The acts creating the plaintiff corporation are valid enactments. They do not violate Sec. I, of Article VIII, of the constitution of Missouri, 1865. *Post*, pg. 23.

Session Acts, Mo., 1857, p. 598;
" " 1857–8, p. 599;
" " 1868, p. 187;
St. Louis *v.* Gas Co., 70 Mo. 118;
Gas Co. *v.* St. Louis, 86 Mo. 499;
State *v.* Laclede Gas Co., 102 Mo. 483;
R. R. Co. *v.* Shambaugh, 106 Mo. 568.

Neither do they violate Section 25 of Article IV, of said constitution. *Post*, pg. 26.

Cases above, and

Boonville *v.* Trigg, 46 Mo. 289;
State *v.* Draper, 47 Mo. 33;
State *v.* Miller, 100 Mo. 446;
State *v.* Bennet, 102 Mo. 356.

III.

Said acts are now in full force, and entitle the plaintiff to "have, hold, exercise and enjoy" the rights thereby conferred.

State *v.* Laclede Gas Co, 102 Mo. 483. *Post*, pg. 30.

IV.

Among the privileges conferred is the right to light the city of St. Louis, and to make and vend

> "gas, gas lights and gas fixtures and any substance or material that may now or hereafter be used as a substitute therefor; and to that end to establish and lay down in any portion of the corporate limits of St. Louis any pipe, fixture or thing necessary or proper to do the same."

Sec. 5, Act Mch. 2, 1857, as amended by Sec. 1 of the Act of Mch. 26, 1868. *Post*, pg. 36.

V.

The ordinance of 1887, as amended by Ordinance 16,894, is void because—

First. It delegates to the Board of Public Improvements the regulation of the use of the streets of St. Louis by electric companies, whereas the charter of the city provides

that the "Mayor and Municipal Assembly shall by ordinance regulate the use of the streets." *Post*, pg. 43.

Par. 2, Sec. 26, Art. 3 of the City Charter;
II Rev. Stats. of Missouri 1889, p. 2096;
Ruggles *v.* Colliers, 43 Mo. 353;
St. Louis *v.* Clemens, 43 Mo. 395
St. Louis *v.* Buckner, 44 Mo. 19;
St. Louis *v.* Clemens, 52 Mo. 133;
Haegela *v.* Mallinckrodt, 46 Mo. 577;
Saline Co. *v.* Wilson, 61 Mo. 237;
Thompson *v.* Boonville, 61 Mo. 282;
Matthews *v.* Alexandria, 68 Mo. 115;
St. Louis *v.* Russell, 116 Mo. 248;
St. Louis *v.* Howard, 119 Mo. 41;
St. Joseph *v.* Wilshire, 47 Mo. App. 145;
King Co. *v.* Hamilton, 51 Mo. App. 120;
O'Neil *v.* Ins. Co., 166 Pa. 72;
Anderson *v.* Ins. Co., 28 L. R. A. 609.

Second. It exacts from the plaintiff a tax of five per cent upon its gross receipts, and to that extent impairs the obligation of its contract with the State.

State *v.* Laclede Gas Co., 102 Mo. 483;
Rushville *v.* Gas Co., 15 L. R. A. 321. *Post*, pg. 49.

Third. It wholly prohibits the exercise by plaintiff of the powers and privileges conferred by its charter, and thereby impairs the obligation of said contract.

Sec. 10 of Art. I of the Const of the U. S. *Post*, pg. 54.

VI.

Section 35 of Article IV. of the Charter of St. Louis charges upon the Street Commissioner of said city the duty

of repairing, etc., the streets, and the ordinances of the city provide that no person shall make an excavation in the streets without a permit from said Commissioner.

II Rev. Stats. Mo. 1889, p. 2109;
Rev. Ords. St. Louis, 1892, Sec. 1335. *Post*, pg. 55.

VII.

The Street Commissioner refuses a permit, and mandamus is the proper remedy.

State *v.* Laclede Gas Co., 102 Mo. 472;
State *v.* Weeks, 93 Mo. 449;
State *v.* May, 106 Mo. 488. *Post*, pg. 56.

ARGUMENT.

I.

JURISDICTION OF THIS COURT.

With respect to the jurisdiction of this Court to consider and determine the questions presented by the record, there can be no doubt. Sec. 10 of Article I. of the constitution of the United States declares that "No State shall pass a law impairing the obligation of a contract." Section 709 of the Revised Statutes of the United States allows a writ of error from this Court for the review of a final judgment or decree of the Supreme Court of a State where is drawn in question the validity of a statute of, or authority exercised under the State, on the ground of their being repugnant to the constitution of the United States, and the decision is in favor of their validity. This Court has recently and repeatedly decided

1. "This Court has appellate power to revise the judgment of the Supreme Court of a State whenever such court shall adjudge that not to be a contract which has been alleged, in the form of legal proceedings, by a litigant, to be one within the meaning of that clause of the constitution of the United States which inhibits the States from passing laws impairing the obligation of contracts."

2. "When the State court upholds the subsequent law on the ground that the contract did not confer the right claimed, this Court may inquire whether the supposed contract did give the right; because, if it did, the subsequent law cannot be upheld."

3. "When the existence and construction of a contract are undisputed, and the State court upholds a

subsequent law on the ground that it does not impair the obligation of the admitted contract, this Court has jurisdiction."

Mobile & O. R. R. Co. *v.* Tenn., 153 U. S. 486 (1894).

In the present case the plaintiff in error alleges that the State made with it a contract whereby the right to lay in the streets of St. Louis "any pipe, fixture or thing" that might be necessary or proper to enable it to light said city and "make and vend gas, gaslights and gasfixtures, or any substance or material that might at any time be used as a substitute therefor" was perpetually conferred; that the city thereafter passed an ordinance which wholly prohibits the plaintiff from laying in one or any of its streets any pipe or fixture for the purpose of enabling it to vend, by underground conduits, electric lights.

The validity of the subsequent ordinance is directly drawn in question. The Supreme Court of Missouri decided in favor of its validity. This Court has undoubted jurisdiction to decide whether such contract exists or not; what is its proper construction; and whether said ordinance impairs the rights thereby conferred; — and this it will do independently of the local tribunal.

II.

VALIDITY OF PLAINTIFF'S CHARTER.

The charter of plaintiff in error is derived from the following three acts of the legislature of Missouri: —

An Act to incorporate "The Laclede Gas Light Company."

Be it enacted by the General Assembly of the State of Missouri, as follows: —

§ 1. James M. Hughes, Edward Bredell, Robert Holmes,

John C. Rust, Charles Gibson, Samuel H. Gardner, Henry A. Clover, and Archibald Gamble be, and they are hereby created and constituted a body politic and corporate, by the style of "The Laclede Gas Light Company," and by that name they and their successors and assigns shall have perpetual succession, may contract and be contracted with, sue and be sued, and may also hold and convey, or otherwise manage and dispose of such property, real, personal and mixed, as may be necessary for the purposes of said corporation and the prosecution of its legitimate business.

§ 2. The capital stock of said company shall be fifty thousand dollars, and the same may be increased to two million dollars, which shall be divided into shares of one hundred dollars each.

§ 3. The affairs of said company shall be conducted by a board of not less than five directors, and such officers and agents as they may deem necessary, said directors to be chosen annually by the stockholders, each share of stock being entitled to one vote in such election, and they shall hold their offices for one year, and until their successors are elected and qualified; said directors shall have power to ordain and make all needful by-laws, rules and regulations, for the transaction of the business of said company, and, under the direction of the stockholders, may have absolute power over all the property and effects of said company. They may also fill vacancies in their board until the next regular election.

§ 4. The said corporators, or a majority of them, may at any time, open books in the city of St. Louis for subscription to the capital stock of said company, and, upon the sum of fifty thousand dollars being subscribed, may organize said company under this charter.

§ 5. The said company, its successors, and assigns, shall within all that portion of the present corporate limits of the city of St. Louis, in St. Louis County, not embraced within the corporate limits of said city, as established by the act entitled "An Act to incorporate the city of St. Louis," approved February 8, 1839, have and enjoy, during the continuance of this act, the sole and exclusive privilege and right of lighting the same, and of making

and vending gas, gas-lights, gas-fixtures, and of any substance or material that may be now or hereafter used as a substitute therefor; and to that end, may establish and lay down in said corporate limits, all pipes, fixtures, or other thing properly required, in order to do the same (the same to be done with as much dispatch and as little inconvenience to the public as possible), and shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company.

§ 6. The city of St. Louis and said company may make any contracts they may deem to their mutual advantage, in regard to the lighting of any parts of said portion of said corporate limits, or any other thing relating to the business and affairs of said company. The said city shall have the right at the expiration of twenty years from the time of the organization of said company, under this charter, to purchase all the property and effects of the same, paying therefor to the same the value of such property and effects with twenty per cent added thereto, such value to be fixed by two appraisers, one to be chosen by he city and the other by the company, and if they cannot agree, then the two thus chosen shall nominate a third man, and a decision of any two of the three shall be binding; and upon such purchase being made, all such property and effects, and all rights and privileges granted to said company shall immediately pass to and vest in said city. If said city fail to purchase said property and effects, then this charter shall be and the same is hereby renewed and extended for the further period of thirty years after the expiration hereof.

§ 7. Any person or body corporate who shall, within said portion of said corporate limits, interfere with the privileges hereby granted to said company, or exercise like acts or privileges, shall, for every such offense, forfeit and pay to said company one thousand dollars, and each day's continuance of such offense shall be construed to be, and be, a new offense, under this section.

§ 8. The said company and this act is hereby exempted from the operation of sections 6, 7, 13, 14, 15, 18, and 20; of article first of the act entitled, "An Act concerning Corporations," approved November 23, 1855.

§ 9. This act shall take effect from its passage, and shall continue in force for thirty years.

Approved March 2, 1857.

An Act supplementary and amendatory of an act entitled "An Act to incorporate the Laclede Gas Light Company."

Be it enacted by the General Assembly of the State of Missouri, as follows:

§ 1. The act to which this act is amendatory is hereby amended as that the words "sole and exclusive," in the fifth section of the act are stricken out.

§ 2. The city of St. Louis shall not be compelled, in any purchase which it may make under the sixth section of the before recited act, to pay more than the appraised value of the property and effects of the corporation created by said act, without any addition of percentage.

This act to take effect and be in force from and after its passage.

Approved March 3, 1857.

An Act to amend an act to incorporate The Laclede Gas Light Company, approved March 2, 1857.

Be it enacted by the General Assembly of the State of Missouri, as follows: —

Section 1. The said Laclede gaslight company shall and may, within the corporate limits of the city of St. Louis, as the same are now or may hereafter be established, exercise, have, hold, and enjoy forever, all the rights, privileges, and franchises granted to it by the fifth section of the act to which this act is amendatory, and may at any time lease, sell or dispose of any portion of said rights, privileges and franchises to individuals, associations or corporations, intending or desiring to exercise the same within any portion of the limits aforesaid.

Sec. 2. The capital stock of said company may be increased from time to time to such amount as may be necessary to carry on its business.

Sec. 3. Nothing in this act contained shall be construed

as affecting the vested rights of the St. Louis gaslight company; and the sixth section of the said act to which this act is amendatory, is hereby repealed.

Sec. 4. An act entitled an act supplementary to and amendatory of an act entitled an act to incorporate the Laclede gaslight company, approved March 3, 1857, is hereby repealed.

Sec. 5. This act shall take effect from its passage.

Approved March 26th, 1868. (Trans., pgs. 5, 6, 7.)

The constitutionality of the act of 1868 by which the rights now asserted are conferred, is attacked upon the ground that said act violates Sec. 1 of Art. VIII., and Sec. 25 of Art. IV. of the constitution of 1865. These sections and the objections of defendants are hereinafter fully set forth. At the outset we deem it proper to call the attention of the Court to the circumstances under which the plaintiff was incorporated, the objects for which its charter was granted, and the constructions which have heretofore been put upon the acts of the legislature by the local tribunals. The facts stated will be found established by the record, the session acts, or the reported decisions of the Supreme Court of Missouri.

St. Louis Gas Light Co. A corporation known as the St. Louis Gas Light Company was incorporated by a special act of the legislature in the year 1837. Its charter, as amended, conferred upon it "the sole and exclusive right and privilege of manufacturing and vending gas within the City of St. Louis and its suburbs" until January 1, 1890 (Trans., pg. 47).

Session Acts Mo. 1837, p. 133;
Session Acts of Mo. 1839, p. 142;
City of St. Louis *v.* Gas Co., 70 Mo. 118 (1879);
Gas Co. *v.* St. Louis, 86 Mo. 499 (1885).

Laclede Gas Light Co. The Laclede Gas Light Company, plaintiff in error, was incorporated by an act approved March 2, 1857. The act in terms conferred upon the company the "sole and exclusive privilege of manufacturing and vending gas, etc," until March 2, 1887, in all that part of the then limits of St. Louis, which were not embraced within the boundaries established for the city by an act of February 8, 1839, and in the event that the city did not purchase the works of the company, until March 2, 1917. The city boundaries established by said act were Seventh street on the west, and Biddle street on the north (Acts 1839, p. 142; Acts 1857, p. 598).

Predicament of Laclede Co. The plaintiff was duly organized, within the meaning of the act of 1857, but the effect of that part of the charter theretofore granted to the St. Louis Gas Light Company, which conferred upon said company the sole and exclusive privilege of making and vending gas within the city of St. Louis and its suburbs until January 1, 1890, was to prevent plaintiff from doing business until that time, without the consent of the St. Louis Company. It was so decided by the Supreme Court of Missouri in the case of the City of St. Louis *v.* St. Louis Gas Light Company, 70 Mo. 120 (1879).

> "The St. Louis Gas Light Company had by virtue of its charter the right to exclude the Laclede Gas Light Company from making and vending gas within the city. * * * It may therefore be implied that it was the purpose of the legislature that the Laclede Company might obtain, if it could, from the St. Louis Company, a waiver or abandonment of its right to exclude competition."

In the year 1868, the Laclede Company had not obtained from the St. Louis Company a waiver of its exclusive privileges. Eleven years of its life had elapsed, but during that

time it had been disabled from carrying on the business for which it was created. Its charter would expire in 1887, if the city should in the meantime elect to purchase its plant. The exclusive privileges of the St. Louis Company obtained until January 1, 1890 (Trans., pg. 47–48).

Act of 1868. Under such circumstances, the legislature of the State passed the act of March 26, 1868, entitled "An Act to amend an Act to incorporate the Laclede Gas Light Company." Its first section declared that the company

> "May within the corporate limits of the city of St. Louis *as the same are now or may hereafter be established*, exercise, have, hold and enjoy *forever* all the rights, privileges, etc., granted to it by the fifth section" of the original charter.

The second section authorized the company to increase its stock to such an amount as might be necessary to carry on its business. The third section prevented any invasion of the exclusive privileges of the St. Louis Gas Light Company, and repealed that section of the original charter (act of 1857) which authorized the city of St. Louis to purchase the property of the Laclede Company, and which provided that if the city did not purchase, the company might exist until 1917 (*ante*, pp. 11 and 12).

The effects of this amendment were far-reaching. While it expressly suspends the exercise of the rights conferred until the expiration of the exclusive privileges of the St. Louis Company, it confers them forever, and authorizes them to be exercised throughout the limits of the city as then or thereafter established. It deprives the city of its right to purchase the property of the company. It authorizes the stock of the company to be increased from time to time to any amount that might be necessary to carry on its business.

Tripartite Agreement. After the passage of this act of 1868, an instrument known as the Tripartite Agreement was made and executed by the city of St. Louis, the St. Louis Gas Light Company and the Laclede Gas Light Company (Trans., pg. 7).

The considerations moving to the various parties were of very great value. The St. Louis Company thereby released forever all claims of exclusive privilege within any part of the city, and transferred to the Laclede Company all of its pipes, mains, etc., north of the south line of Washington avenue. The Laclede Company paid to the St. Louis Company a large sum of money for such concessions, and bound itself to furnish gas within the ceded territory for the time specified. It also released forever to the city all claims of exclusive privilege. The city for the considerations aforesaid, surrendered its right to purchase the property of the St. Louis Company and contracted to pay the two companies, for gas furnished by them respectively, a stated price.

City *v.* Gas Co., 70 Mo. 118.

For the purposes of the present suit, the significant parts of this agreement are those which relate to the territory to be occupied by the Laclede Company, and the term of the contract. It will be remembered that the act of 1857, the original charter of the company, did not authorize it to vend gas *south* of Biddle street nor *east* of seventh, nor after March 2, 1887, except in a certain event (*ante*, p. 11).

The Tripartite Agreement required the Laclede Company to vend gas in all that part of the city which lay *south* of Biddle street, *north* of Washington avenue and *east* of Seventh street until January 1, 1890. It had power to do this *only* under the act of 1868.

Suit of City v. *Gas Co.* Some time after the Tripartite

Agreement went into effect, the city of St. Louis brought a suit against the St. Louisand the Laclede Companies to avoid that agreement and get possession of the property of the St. Louis Company. In this suit it was urged, among other things, that the agreement was void because the Laclede Gas Light Company had no power to execute it. The Circuit Court of St. Louis so decided, but upon appeal to the Supreme Court of the State its decision was reversed. The effect of this judgment of the Supreme Court was not only to remove all doubt with respect to the validity of the Tripartite Agreement, but to establish the validity of the Act of 1868, because, by said act only, was the Laclede company authorized to do business in the territory and for the term specified in the agreement. St. Louis *v.* St. L. Gas Light Co., 70 Mo. 118 (1879).

Suit of Gas Co. v. *City.* In a subsequent case, wherein the St. Louis Gas Light Company sought to enforce the provisions of the Tripartite Agreement, it was again urged by the city that said agreement was void on the ground that it must bind all parties or none, and that it did not bind the Laclede Gas Light Company because such company was not authorized to make such a contract. The Supreme Court of Missouri then said, affirming its previous judgment:—

> "It is assumed, not decided, that the first branch of the proposition is correct, but the second is not true in point of fact or law. The 6th section of the act of March 2, 1857, incorporating the Laclede Gas Light Company gave to it and the city the power to make any contract they deemed best with regard to lighting a *portion* of the city, and to the city the right to purchase the property of the company at the expiration of twenty years. This section, it is true, *was repealed by the act of March 2, 1868*, and hence the conclusion contended for is drawn. But by the 5th section of the

act of 1857 that company had power within a *defined district* to light the same, to make and vend gas and gaslights, and to lay down pipes therein and have all other powers necessary to carry out the privileges and powers thereby granted.

"*All of these rights, privileges and franchises are by the act of 1868, extended over the corporate limits of the city.*" Gas Co. *v.* St. Louis, 86 Mo. 499, 500 (1885).

Suit of City v. *Laclede Co.* In addition to the foregoing cases there is a third, wherein the validity of said Act of 1868 was controverted, and was again established by the Supreme Court of Missouri.

Prior to January 1, 1890, the date of the expiration of the franchises of the St. Louis Gas Light Company, that company procured from the city of St. Louis a franchise whereby *it, its successors and assigns* might, for a period beginning January 1, 1890, and ending January 1, 1920, make and vend gas within the limits of the city at not more than $1.25 per thousand cubic feet.

On the 31st of December, 1889, this franchise was sold at public auction by the trustees of the St. Louis Company, and purchased by the Laclede Company. Thereafter the city of St. Louis passed what is known as the *90 cents gas* ordinance, which prohibited the Laclede Company from charging for gas more than ninety cents per thousand cubic feet. The company refused to comply with the ordinance and thereupon a suit was begun to compel compliance by mandamus.

Two defenses were set up by the company: first, that the ordinance impaired the franchise purchased from the St. Louis Company, and second, that it impaired the obligation of the company's charter. The Supreme Court of the State sustained both defenses. With respect to the charter of the company, the Court said: —

"III. The third point at issue, as already stated, presents the question whether the charter of the respondent company, granted by the State, contains such features of a contractual nature as forbid and prevent any imterference therewith either by the State government or by any municipality representing the authority of that government. The respondent company exists by virtue of a special charter granted March 2, 1857, as amended by an act approved March 26, 1868." * * *

"The fifth section of the original act incorporating the respondent gave it ample powers of contracting with the city for making and vending gas, etc., etc., and the amendatory act made its franchises co-extensive with the boundaries of the city. This point was inferentially thus ruled in City of St. Louis *v.* St. Louis Gaslight Co., 70 Mo. 69, and thus ruled directly in a later case" (86 Mo. 499).

State *v.* Laclede GasLight Co., 102 Mo. 483 (1890).

Upon three occasions, therefore, has the validity of the Act of 1868 been sustained by the Supreme Court of the State of Missouri. For many years the city has acquiesced in its decision. For seven years after the alleged expiration of its charter, the Laclede Company has been suffered to do within the limits of the city what it had the power to do under the act of 1868 alone. The city has even made and is now performing on its part, a contract with the company for lighting certain of its streets and alleys by electricity. These things have been done since the decisions referred to were rendered, and after the City Counselor, its chief law officer, had in an official opinion advised it with respect to the status and rights of the Laclede Company. We venture to quote from this official opinion because the lawyer who wrote it was counsel for the city in all the cases referred to, and therefore was familiar with all of the questions raised.

"The question whether the act of March 26, 1868, is unconstitutional upon the ground that it does not conform to section 25 of Art. IV. of the constitution of 1865, *has been decided by the Supreme Court in the negative.* * * * I am constrained to say, in answer to question four, that the chartered life of the Laclede Gas Light Company will under the above enactments continue forever." Official Opinion, City Counselor Bell, Dec. 30, 1880.

Notwithstanding the considerations referred to, it is again urged by the city that the act of 1868 is invalid. An effort is made to evade the decisions of the Supreme Court upon the plea that what has been heretofore said with respect to the validity of said act is *obiter dictum* and without full consideration of the objections urged against it. Yet it cannot be denied that in all of the cases cited the validity of the act of 1868 was necessarily involved. In two of them its validity was expressly affirmed. We might therefore dismiss without further notice, the various objections raised, relying upon the former judgments of the Supreme Court of Missouri.

That Court has repeatedly decided that the

"Plea of res adjudicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of the litigation and which the parties exercising reasonable diligence might have brought forward at the time." — Chouteau *v.* Gibson, 76 Mo. 64.

Assuming, therefore, that the validity of the act of 1868 had not been raised in the cases referred to, yet upon the principle invoked, as between the parties its validity has been established because necessarily involved. But in

point of fact the constitutionality of said act was questioned in all of said cases. An examination of the record in the case first decided (City *v.* Gas Co., 70 Mo. 120), shows that the Court below adjudged the act to be invalid as being in conflict with section 1 of article VIII. of the constitution of 1865. In his opinion the judge said:—

> "The constitution (1865, Art. VIII., sec. 1) provides that no act can be revived or re-enacted by mere reference to the title thereof, but in every such case the act revived must be set forth and published at length as if it were an original act. * * * The act of 1868 violates this provision."—Opinion of Gottscholk, p. 8.

Moreover, it appears by the brief of counsel for the city in said case, now on file in the office of the clerk of the Supreme Court of Missouri, that it was urged that the act of 1868

> "was inoperative because it conflicts with section 25 of article IV. of the constitution of 1865 then in force, which provides that no act shall be revived or re-enacted by mere reference to the title thereof * * * but in every such case the act revived or re-enacted, or the part of the act amended shall be set forth and published at length, etc."—Brief of City Counselor Bell, p. 16.

It is true that it does not appear by the published decisions of the Supreme Court delivered in the first two of the cases cited, that the constitutionality of the act was discussed or expressly decided, but that court has recently declared that where a question is discussed and decided in a lower court and is necessarily involved, the judgment of the Supreme Court affirming or reversing the judgment below *implies a ruling on the question.*

Hanna *v.* South St. I. Land Co., 126 Mo. 1 & 10 (1894).

That the act of 1868 was considered and passed upon in the case of the City *v.* the Laclede Gas Light Company (102 Mo. 479, 480, 483 — 1890) appears upon the face of its judgment and is recorded in its published opinions.

In view of the foregoing considerations, we submit with the utmost confidence that this Court would not hesitate to follow the previous adjudications of the Supreme Court of Missouri, whatever the present opinion of that court may be with respect to said act. No opinion is, however, expressed upon this point by the court below. It "assumes, not decides" that plaintiff is "an existing corporation possessing all the powers, rights and privileges its charter purports to confer upon it." (Trans., pg. 41.)

It is perhaps supererogation to again discuss the validity of the act of 1868 as if it were res integra, but counsel for defendants urges with such manifest sincerity that said act o ght now to be disregarded, that a brief discussion of the constitutional provisions invoked may not be omitted.

Sec. 1, Art. VIII. Const. of Mo. 1865. Section 1 of Article VIII. of the constitution of 1865 provides

> "that no act shall be passed *reviving or re-enacting* any act heretofore passed creating any private corporation, where such corporation shall not have been organized and have commenced the transaction of its business within one year from the time such act took effect, or within such other time as may have been prescribed by such act for such organization and commencement of business."

The act of 1868 is entitled "an act to amend an act to incorporate the Laclede Gas Light Company, approved March 2, 1857." It does not purport in terms to *revive or re-enact* the act of 1857. The record shows, however, that

in 1868 the Laclede Company had not "commenced the transaction of its business," and it is contended that the effect of this omission was to terminate the existence of the corporation either after one year from the date of its charter, or at the time of the adoption of the constitution; so that the legislature might not thereafter, even under color of an amendatory act, revive its powers and privileges.

The answer to this argument is as follows: When the act of 1857 was passed, Sec. 6, p. 371 of the Revised Statutes of Mo. 1855, provided that

> "if any corporation hereafter created shall not organize and commence the transaction of its business within one year from the date of its incorporation, its corporate powers shall cease."

The 8th section of the act of 1857, however, expressly exempted the Laclede Company, from the operation of this law. The company, therefore, was by the express terms of its charter, authorized to commence business at any time within its corporate life. The reason for this exemption is obvious if the exclusive privileges conferred by the act or 1839 upon the St. Louis Gas Light Company be borne in mind. Until the expiration of these exclusive privileges, (i. e., until 1890) the Laclede Company was disabled from doing business, and was in the meantime exempted from the operation of the general law. It did, however, organize within the year (Trans., pg. 47). It appears, therefore, that at the time of the adoption of the constitution of 1865, the charter was in full force and effect. The constitution does not purport to repeal it. It prohibits the *revival* of corporations which had not commenced business within one year *or* the time prescribed by their charters. The plaintiff's charter allowed the company, as we have seen, to commence business at any time

within its corporate life. This is the undoubted object and effect of the section which exempts the company from the obligation to begin business within one year imposed by the general law on all other companies, and is the only construction reconcilable with the exclusive privileges theretofore conferred upon the St. Louis Gas Company.

If it had been the purpose of the framers of the constitution to thereby repeal the charter of plaintiff, the constitution of the United States precludes such a consummation. The general law of 1855 provided that all charters thereafter granted by the legislature should be "subject to alteration, suspension and repeal in the discretion of the legislature" (Sec. 7, p. 371, Vol. I. Revised Statutes 1855; act approved Nov. 23, 1855). The 8th section of plaintiff's charter expressly exempted the company from the operation of the general law, and thereby signified its will that said charter should be unalterable and unrepealable. The constitution itself was powerless, under such circumstances, to repeal it, even if it had been the design of its framers to do so.

Fisk *v.* Police Jury, 116 U. S. 131;
Water Works Co. *v.* N. O. Co., 120 U. S. 64.

Assuming for the foregoing reasons, the existence of the corporation in 1868, the act of that date could not in the nature of things *revive* or *re-enact* what was already alive and in full force. The act of 1868 must be held to be what it purports to be, an amendatory act. With respect to the propriety of such legislation, under the constitutional provision quoted, there can be no doubt.

> "The prohibition against reviving charters implies that the charter to be revived is lifeless. * * * While the constitution prohibits the creation of private corporations by special laws and contains other

restrictions against special legislation, still it was held by this court that the legislature could by a special act *amend* special charters previously existing."—R. R. Co. *v.* Shambaugh, 106 Mo. 568–9 (1891).

Sec. 25 of Art. IV. of the Const. of 1865.

"No act shall be revived or re-enacted by mere reference to the title thereof; nor shall any act be amended by providing that designated words thereof shall be struck out, or that designated words shall be struck out and others inserted in lieu thereof; but in every such case the act revived or re-enacted, or the part of the act amended shall be set forth and published at full length, as if it were an original act or provision."

The second objection urged against the act of 1868 is that it violates the foregoing constitutional provision, in that it revives or re-enacts the act of 1857, by mere reference to the title thereof, and amends said act by striking out particular parts of it and inserting other provisions in lieu thereof, without setting forth and publishing the parts of the act amended.

With respect to so much of this objection as rests upon the presumption that an act to *amend* is an act to *revive*, nothing need be said in addition to what was said under Sec. 1 of Art. VIII.

The argument that the act of 1868 falls within the prohibition of Sec. 25, Art. IV., because its *effect* is to modify the act amended, is entitled to little consideration. The constitution prohibits amendments to be made *in a particular manner*, that is,

"*by providing* that designated words be stricken out, or that designated words be stricken out and others inserted in lieu thereof; *in every such case* the act amended"

must be set forth, etc.

The act of 1868 *does not provide* that *designated words* of the act of 1857 be stricken out, or that any other words be inserted in lieu thereof. It is not therefore "*such a case*" or kind of amendment as the constitution prohibits. It does not fall within the letter of the provision invoked.

Is this, or is any court at liberty to enlarge the scope of the instrument in furtherance of a presumed object, so that it shall inhibit not only the special class of amendments described, but also all amendments whatever which in the opinion of the court involve the inconveniences or dangers against which the provisions was directed?

It is a familiar rule of constitutional interpretation that

> "No legislative enactment should be declared unconstitutional unless it appears very clearly so, and every reasonable intendment should be made to sustain it."

Fletcher *v.* Peck, 6 Cranch, 128;
Pine Grove *v.* Tolcat, 86 U. S. 667;
Stephen *v.* Block, 43 Mo. 390;
State *v.* R. R. Co., 43 Mo. 471;
State *v.* Pond, 93 Mo. 618;
State *v.* Burgdoerfer, 107 Mo. 1;
Deal *v.* Miss. Co., 107 Mo. 468.

It has been repeatedly declared that courts are not at liberty to usurp the prerogative of the people and add to or detract from the plain meaning of the instrument, however desirable in its opinion such a charge may be.

Spencer *v.* State, 2 Ind. 76;
People *v.* Purdy, 2 Hill, 35;
Newell *v.* People, 7 N. Y. 97;
Sturgis *v.* Crownenshield, 4 Wheat. 202;

U. S. *v.* Fisher, 2 Cranch, 399;
Warren *v.* Paving Co., 216 Mo. 577;
R. R. Co. *v.* Maguire, 49 Mo. 502.

Tried by these familiar rules, the constitutionality of the act of 1868 plainly appears. It does not fall within the letter nor expressed meaning of the instrument, and must therefore be upheld. How radical is the alteration of the instrument contended for, is manifest if we compare the provision under consideration with the provision adopted by other States upon the same subject.

MISSOURI CONST., 1865, ART. 4, SEC. 25.

"Nor shall any act be amended by providing that designated words thereof shall be struck out and others inserted in lieu thereof; but in every such case the act or part of the act amended shall be set forth and published at length as if it were an original act or provision."

OHIO CONST., 1851, ART. 2, SEC. 16.

"No law shall be revised or amended, unless the new act contain the entire act revised or the sections amended."

INDIANA CONST., 1851, ART. 4, SEC. 21.

"No act shall be revised or amended by mere reference to its title; but the act revised or section amended shall be set forth and published at full length."

To so construe the Missouri constitution as to have it prohibit not only the special class of amendments mentioned, *but all others*, is to give it precisely the effect of the provisions adopted by other States, notwithstanding the obviously broader scope and the peculiar phraseology of these instruments.

Our own Supreme Court has repeatedly decided *with respect to this very section*, that such an interpretation cannot be allowed.

> "Counsel urge that this mode of accomplishing amendments is just as much within the prohibition of the constitution as if designated words had been struck out

and others inserted in lieu thereof. It is greatly to be regretted that our constitution did not adopt the same terms and language that we find in other States; but we must construe the law as we find it."

Boonville *v.* Trigg, 46 Mo. 289 (1870).

"The constitution is silent upon the question of implied repeals; and whether or not, as so elaborately argued by counsel, the same evil results from allowing such repeals as those specially provided against in that instrument, we cannot create a new prohibition, or give to the present one a scope beyond its import, and beyond the construction universally given it.

State ex rel. Maguire *v.* Draper, 47 Mo. 33.

"The object of this section (25 of Art. IV. of the constitution of 1865) is sufficiently stated in Morrison *v.* R. R. Co., 96 Mo. 602. It is there shown that when an act undertakes to amend a former statute, it is not sufficient to say certain words are stricken out, or certain words are inserted, but the section as amended must be set out in full, and this is all that is required. Here it is true that portions of the special act creating the school corporation are repealed or modified by the act of March 3, 1887, and the last named act does not name the sections which are thereby repealed, nor are the sections thereby modified set out in their modified forms. *This may lead to inconvenience in requiring a comparison of the old and new law, but such legislation is not prohibited by the provision of the constitution before quoted.* * * * *This act does not seek to amend any former law by simply striking out designated words or by inserting certain words, or by striking out words and inserting others in lieu thereof, and is not within the constitutional prohibition.*"

State *v.* Miller, 100 Mo. 446 (1890);
State *v.* Bennett, 102 Mo. 356 (1891).

Besides the foregoing considerations, which are suffi-

ciently conclusive, there are, as we have shown, three adjudications of the Supreme Court of Missouri wherein the validity of the very act under discussion was attacked upon the very grounds now again urged against it, and was unanimously sustained.

City *v.* Gas Co., 70 Mo. 120;
Gas Co. *v.* City, 86 Mo. 500;
State *v.* Laclede Gas Co., 102 Mo. 483.

Under such circumstances it is futile to further discuss the question. The act of 1868 cannot be avoided without disregard of fundamental rules of constitutional construction; of numerous cases applying such rules to the provision invoked; and of three cases, two of them between the parties now before the Court, wherein the precise law under consideration was attacked upon the precise ground now urged, and was sustained.

Assuming, therefore, that the act of 1868 is a valid enactment, it remains to construe its terms, for the purpose of ascertaining whether it confers the rights which this Court is asked to protect.

III.

CONSTRUCTION OF CHARTER. See *ante* pg. 11.

Duration of Charter. It was contended below by counsel for defendants in error, that the charter of the plaintiff expired on the 2d day of March, 1887, and that therefore it now has no right to exercise the rights conferred. This contention is based upon the following facts and assumption. The act of 1857 conferred upon the Laclede Company the powers and privileges enumerated until March 2, 1887) (Secs. 5 and 9) and provided (Sec. 6) that, if the City of St. Louis failed to purchase its works twenty years after

the company's organization, said powers and privileges should survive for a further period of thirty years; or until March 2, 1917. The act of 1868 repealed the 6th section of the Act of 1857 and thereby deprived the company of the contingent life of thirty years which it confers. It is true that the act of 1868 expressly confers *forever* the powers and privileges originally conferred for a definite period only, but, it is assumed by defendants, the effect of the amendment is not to prolong the life or powers of the company.

The strength, or rather weakness of this position depends upon the meaning of the word *forever*, in the act of 1868. If it means nothing, then it is true that the plaintiff's powers ceased March 2, 1887. If on the other hand it means "perpetually," "in everlasting continuance," "eternally," "through all ages," etc., which is the usual meaning of the word given in standard dictionaries, such as Webster and the Century, then the powers and privileges enumerated may now and for an indefinite period hereafter, be held, exercised and enjoyed by plaintiff.

It is unnecessary to discuss so manifest a proposition as that the word *forever* in the act of 1868 must be allowed some force and effect, or to attempt to show that in the absence of paramount considerations, it should be allowed its ordinary meaning. What are the considerations which should induce this Court to eliminate *forever* from the act, or give it an extraordinary meaning which would deprive it of all significance?

Upon this point the following argument was made below, and is, perhaps, as ingenious as any that can be devised.

The first section of the act of 1857 confers "perpetual succession" upon the Laclede Company. The 5th section confers the powers and privileges enumerated "during the continuance of this act." The 9th section provides that the act "shall continue in force" for thirty years. Al-

though the act of 1868 provides that the company may enjoy *forever* the powers, privileges, etc., conferred by the 5th section aforesaid, it does not in terms repeal the 9th section which restricts the life of the company to thirty years. The significance of this omission is found in the fact that another section of the act of 1857, to wit, Sec. 6, was expressly repealed. Why, it is suggested, did the legislature omit to repeal section 9, when it repealed section 6, if it had intended to repeal *both* sections? If for the foregoing reason section 9 be confessed to be still in force, then a meaning must be given to the word *forever* which is reconcilable with the thirty years of said section. It is no more difficult to reconcile *forever* with *thirty years*, than the *perpetual succession*, with which it is synonymous, conferred by the first section of the act of 1857, yet confessedly the act of 1857 did not confer more than thirty years of life. It is therefore concluded that the life of the company expired March 2, 1887.

A sufficient answer may be made to this argument by reversing the order of the acts under consideration. Let it be assumed that the first section of the act of 1857 conferred perpetual succession upon the company; that the 5th provided that the company should enjoy the powers enumerated *during the continuance* of the act; that the 9th section provided that the act should *continue in force forever;* and that the act of 1868 had amended the 5th section of the act of 1857, by providing that the corporation should enjoy the rights and powers therein conferred for *thirty years* only, and by repealing the 6th section. Under such circumstances it might with equal propriety be argued that the omission of the legislature to repeal the 9th section is significant. Why did it expressly repeal section 6 and omit to repeal section 9 if it had intended to repeal *both* sections? Yet if section 9 be confessed to be still in force, then some meaning must be given to thirty years which is

reconcilable with the *forever* of said section. Therefore an act which, under such circumstances, by way of amendment restricts to thirty years the life of a corporation theretofore chartered to exist forever, does not abridge the life of the company. That such a conclusion is repugnant to common sense goes without saying. It is not less so than the conclusion that an amendment which confers *forever* powers theretofore conferred for thirty years only does not prolong the life of the company.

If there existed any reasonable ground for doubt with respect to the purpose of the legislature when it passed the act of 1868, the circumstances under which it was passed would remove it. The charter of the St. Louis Gas Light Company, already referred to, conferred upon it the exclusive right to manufacture and vend gas within the city until 1890. In 1868 the Laclede Company was therefore in a peculiar predicament. It could not prosecute its business until the expiration of said privileges and in the meantime its life might (1877), be terminated by the city (Sec. 6, act of 1857). To afford, under such circumstances, an inducement to the company to preserve its organization and prepare for the ultimate prosecution of business, was the undoubted object of the act of 1868. The right of the city to purchase the company's property was expressly repealed, and its life was extended *forever* for this purpose and no other.

It is difficult to now realize that thirty years ago the business of gas making might not have been deemed profitable. The risks of the business and the enormous outlay required for its prosecution were, however, clearly perceived. At one time it seems to have been doubtful whether any company could be induced to provide gas for certain districts of the city. In 1859 the legislature of Missouri passed an act entitled "An Act to authorize and encourage the extension of gas works in St. Louis," which

provided that the corporation which "should first extend and lay pipes to furnish gas to any part of said city now destitute of gas shall be protected in the enjoyment of such gas pipes and fixtures of all kinds whatsoever, any law, usage or custom to the contrary notwithstanding," etc. Session Acts, 1859–60, pg. 528.

This act is not more distinctly an evidence of the disposition of the legislature to make provision for the lighting of the whole city, than the act of 1868. The latter act is obviously friendly to the Laclede Company.

It —

greatly enlarges the powers of the company;
extends the territory within which its operations may be carried on;
authorizes the stock of the company to be increased from time to time to such an amount as might be necessary;
repeals the city's right of purchase; and
provides that it may have, hold, exercise and enjoy the powers conferred *forever*.

If any regard be had for the remarkable provisions of this act or the peculiar predicament of the company due to the exclusive privileges of the St. Louis Gas Light Company, the conclusion is irresistible, that the legislature intended to prolong the life of the company, so that it might be enabled, upon the expiration of such privileges, to supply the city and its inhabitants with light. The letter as well as the manifest spirit and purpose of the act of 1868 therefore require that due force should be given to the word *forever*.

How unreasonable, under the circumstances described, is the construction contended for by defendants, appears if the effect of the repeal of the 6th section of the act of 1857 be considered. That section gave to the Laclede Company the right to carry on business within a certain part of the

city until 1917, if the city omitted to purchase its works in 1877.

The repeal of this section by the act of 1868 deprived the company of any possibility of life after 1887 if the word forever is to be ignored. In the meantime it was disabled from doing business without the consent of the St. Louis Company. That the legislature was well aware of this fact appears from the provisions of the third section of the act of 1868, which expressly protects the rights of said company from invasion. It is hardly necessary to urge upon the Court that under such circumstances the intent of the legislature to confer upon plaintiff *forever* the privileges mentioned, is manifest and should be regarded.

In addition to the foregoing considerations, which in our opinion constrain the conclusion we contend for, there are two of paramount influence. In a recent case the Supreme Court of Missouri, while deciding that the words "perpetual succession" in a charter did not necessarily confer perpetual life upon a corporation, holds also that if these words had been accompanied by others, such as *forever*, their conclusion would have been otherwise.

State ex rel. *v.* Payne, 31 S. W. Rep. 797; following State *v.* Stormont, 24 Kansas, 686.

In the case of the State ex rel. the City of St. Louis *v.* the Laclede Gas Light Company, already alluded to (102 Mo. 479) the same court expressly decided *that in 1890*, three years *after the alleged expiration of its charter*, the plaintiff had *under the act of 1868*, the right to vend gas, etc., throughout the limits of the city, independently of any city franchise. The import and necessary effect of this decision is to establish for all time the perpetuity of plaintiff's charter. In the opinion of the city counselor the prior cases between the gas companies and the city had the same effect (*ante*, p. 21).

What follows is predicated upon the assumption that this Court will hold that the act of 1868 is a valid enactment, and that it confers the rights, powers and privileges enumerated *forever*. It remains to determine

1st. Whether the right to sell electric light and lay down in the streets pipes or conduits for that purpose is among the privileges conferred.

2d. Whether the ordinance complained of is a proper police regulation, or an improper impairment of the charter rights of plaintiff.

Right to Sell Electric Light and Lay Conduits. The language of the charter is as broad as any that could have been devised for the purpose of giving to the plaintiff the right to use any means of lighting that might at any time in the progress of invention be discovered (Trans., pp. 5 and 7).

> "The said company, its successors and assigns, shall have and enjoy (forever) the sole and exclusive (abandoned by the tripartite agreement privilege of lighting the whole city of St. Louis as its limits now are or may hereafter be established, and of making and vending *gas, gas lights and gas fixtures, and of any substance or material that may now or hereafter be used as a substitute therefor*, and to that end *may establish and lay down* in said corporate limits *all pipes, fixtures or other thing* properly required in order to do the same (the same to be done with as much despatch and as little inconvenience to thepublic as possible) and shall have all other powers necessary to execute and carry out the privileges and powers hereby granted." Sec. 5, act 1857, as amended by the act of 1868.

No one will have the temerity to assert that it was the purpose of the legislature to restrict the company to the business of selling "gas, gas lights and gas fixtures," in view of the fact that it is also authorized to make and

vend *any substance or material* that might then or thereafter be used *as a substitute* for gas, gas lights and gas fixtures. It is alleged in the answer to defendant's return, and admitted by the demurrer, that long before March 2, 1857, "electricity had been used for illuminating purposes and apparatus had been devised and publicly exhibited to great numbers of persons, by means of which solid bodies could be made incandescent by electric currents, so as to produce light for purposes of illumination." If it be assumed that the strictest interpretation will be given to the charter in furtherance of the public interest, and that nothing will be implied by the Court in favor of the plaintiff, yet it is the duty of the Court to respect the language of an act and withhold nothing which the legislature has plainly intended to confer. Electricity is a substance now used as a substitute for gas; and an electric light, which is carbon rendered incandescent by an electric current, is a material now used as a substitute for gas lights, or carbon rendered incandescent by combustion. Of these things the Court will take judicial notice. They are matters of common knowledge within the constant daily experience of every member of the Court.

Brown *v.* Piper, 91 U. S. 37;
State *v.* Hayes, 78 Mo. 318;
Wolfe *v.* R. R., 97 Mo. 481.

What pretext can be found for excluding from the scope of the grant objects so manifestly within its letter and purpose? The State created a lighting corporation and authorized it not only to make and vend gas and gas lights in the prosecution of its business, but any substance or material that might *at any time* be used as a substitute for either of them. Electric lighting, although then in its infancy, was well known, as the demurrer admits. Who

can say that the legislature did not intend, by the very broad terms of the act, to include such a mode of lighting? The Court cannot deprive the company of the right to vend electric lights without disregarding at least *seventeen words* of the act. No rule of interpretation justifies so flagrant a departure from its manifest meaning. The objections most strenuously urged below relate to the policy, not to the terms of the grant. They are out of place in a court of justice. With the legislature alone rests the power and responsibility of making laws. It is the function of the court to construe — not to reform or revise laws (State *v.* Pond, 93 Mo. 618). Much might be said however in justification of the policy of the legislature. The plaintiff long ago surrendered all claims of exclusive privilege (Trans., p. 7). It is for the public interest that there should be competition in the public service. There are now operating in St. Louis many other corporations engaged in the business of electric lighting. The General Statutes of the State expressly authorize the formation of companies for such purpose (Gen. Stats. 1889, Sec. 2793). Until very recently the ordinances of the city permitted any one to use its streets for the purpose of vending electricity, who would agree to pay five per cent of his gross receipts for the privilege (Art. 2, Chap. 15, Rev. Ords. 1887). The right and power of the State in 1857 and 1868 to control the use of the streets of St. Louis is expressly conceded by the Supreme Court of Missouri (Trans., p. 41). It rested therefore with the legislature to determine upon what conditions such streets might be used for the purpose of gas or any other mode of lighting. The fierce attack now directed against the extent of the grant made, is not in reality predicated upon the construction contended for, but upon the damage done to the municipality by the failure of the legislature to charge upon the company a burden for the city's advantage. The ques-

tion whether in 1868 the corporation would have accepted a charter allowing the city to tax not only the property, but the franchise of the company, is entirely ignored. The legislature did not see fit to impose such a condition, and there is an end of it,— if this Court still adhere to the doctrine that contracts with the State are equally with other contracts protected by the constitution of the United States.

The argument made with respect to the construction of the act is disingenuous. For many years the city has conceded the power of the company to make and vend electricity. It has in fact availed itself of the instrumentalities of the company for lighting its streets by electric lamps, and now uses such instrumentalities. The petition alleges and the answer admits, that there is now in full force a contract made many years ago whereby, for considerations named, the company has undertaken to furnish electric lights for a large district of the city, and that the company is now engaged in performing the obligations thereby assumed. Under such circumstances the city is committed to the construction of the charter we contend for. Its present attack is an argument drawn from the inconvenience of the grant made, and not from rules whereby charters are to be construed.

If it be assumed that the charter of plaintiff confers upon it the right to make and vend electric light as a substitute for gas light, it follows that the company may lay down in the streets "any pipe, fixture or thing necessary or proper" for that purpose, with one proviso: that it do so "with as much dispatch and as little inconvenience to the public as possible."

The company now proposes, in response to a public demand for the removal of overhead wires, to do what it can to obviate the manifest dangers and inconveniences of such

a system, by placing its wires underground, "in an approved and practical method, and with as much dispatch and as little inconvenience to the public as possible." The city refuses to allow it to proceed and charges among other things that the present ordinances of the city prohibit what is proposed.

IV.

Validity of the City Ordinances.

ARTICLE II, CHAPTER 15,

of the Revised Ordinance of the City of St. Louis, 1887 (as amended by Ordinance No. 16894).

Sec. 581. That no wires, tubes or cables conveying electricity for the production of light, heat or power, shall hereafter be placed along or across any of the streets, alleys or public places in the City of St. Louis, by any person, corporation or association not having, previous to the passage of this ordinance, accepted and complied with ordinance number twelve thousand seven hundred and twenty-three, now amended, or shall be duly authorized by the Municipal Assembly and then only as hereinafter provided.

Sec. 582. All such wires, tubes or cables, along or across any of the streets, alleys or public places of the City of St. Louis, shall be placed at such distances above or below the surface of the ground, and secured in such manner as shall be prescribed by the Board of Public Improvements.

Sec. 583. That any person or persons, corporation or association duly authorized by ordinance to do business in the City of St. Louis, and desiring to place along or across any of the streets, alleys or public places of the City of St. Louis, such wires, tubes or cables, shall file in the office of the Board of Public Improvements an application therefor, stating in detail the street, alleys or public places which said wires, tubes or cables are to occupy, and in the manner in which said wires, tubes or cables are to be

secured or supported and insulated, together with a plat, showing the route of such wires, tubes or cables.

Sec. 584. The Board of Public Improvements is hereby authorized upon the filing of the application and plat required by the preceding section to grant a permit for such occupancy of the streets, alleys and public places therein named, with such restrictions, regulations and qualifications as may be prescribed by said Board, and under the supervision and to the satisfaction of the Supervisor of City Lighting.

Sec. 585. Poles.

Sec. 586. Poles.

Sec. 587. Poles.

Sec. 588. Any person or persons, corporation or association having made excavations in the streets, alleys or public places in the city of St. Louis for the purposes aforesaid, shall replace the streets, alleys or public places in such manner and in accordance with such regulations as may from time to time be prescribed by ordinance, or by the board of public improvements, and to the satisfaction of the street commissioner.

Sec. 589. Overhead Wires.

Sec. 590. No person or persons, corporation or association, shall be entitled to any of the privileges conferred by this article except on the following conditions: That said person or persons, corporation or association, before availing himself or itself of any of the rights or privileges granted by this article shall file with the city register his or its acceptance of all the terms of this article, and agree therein that he or it will file with the comptroller of the city, on the first days of January and July of each year, a statement of his or its gross receipts from his or its business arising from supplying electricity for light or power for the six months next preceding such statement, which shall be sworn to by such person or persons, or the president or secretary of such corporation or association; and further agree that he or it will, at the time of filing said statement with the comptroller, pay into the city treasury two and one-half per cent on the amount of such gross receipts up to the year eighteen hundred and ninety, and five per cent on the amount of gross receipts thereafter. And said person or

persons or corporation or association, shall, at the time of filing said acceptance, also file with the city register his or its penal bond in the sum of twenty thousand dollars with two or more good and sufficient securities to be approved by the mayor and council, conditioned that he or it will comply with all the conditions of this article, or any ordinance which may be hereafter passed regulating the placing of wires, tubes or cables in the streets and alleys for the purposes named therein; that he or it will comply with all the regulations made by the board of public improvements having reference to the subject embraced in this article or any ordinance for the purposes herein named; that he or it will make the statements and payments required by the provisions of this section, and will save the city of St. Louis harmless and indemnified from all loss, cost or damage by reason of the exercise of any of the privileges granted by this article or any ordinance which may be hereafter passed relating to the subject-matter of this article.

Sec. 591. Any person or persons, corporation or assot ciation which, or any president, manager, superintenden- or officer in charge of any corporation or association who shall violate or fail to comply with any of the provisions of this article shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined not less than fifty dollars nor more than five hundred dollars.

Sec. 592. The city reserves the right to alter, amend or repeal this article at any time.

Trans., pg. 52.

It is contended by the defendant that the foregoing ordinance is a valid exercise of the police power conferred upon the city by its charter, and this view was adopted by the Supreme Court of Missouri. On the other hand, the plaintiff insists that the ordinance is not a proper police regulation because —

1st. It delegates to the Board of Public Improvements the regulation of the business of electric lighting, whereas

the charter of the city confers upon the Municipal Assembly alone the power to adopt such regulations.

2d. It exacts from the plaintiff a tax of five per cent upon the gross receipts derived from its business, and to that extent impairs the obligation of its contract with the State.

3d. It does not purport to regulate but to wholly prohibit the exercise by plaintiff of the powers and privileges conferred by its charter, and thereby impairs the obligation of said contract.

Ordinance void because it delegates to the B. P. I. the power to make regulations. Assuming, for the moment, that the ordinance under consideration is an attempt to regulate the placing of wires under ground, and that by compliance with the regulations prescribed by the Board of Public Improvements we might obtain a permit to excavate the streets (which is not the case), there remains the question whether the ordinance is a valid exercise of the power conferred by law upon the Municipal Assembly of St. Louis.

Par. 2, Sec. 26, Art. III. of the charter of the city (Rev. Ords. 1892, p. 366), provides that the *Mayor and Municipal Assembly* shall have power *by "ordinance to regulate the use of the streets," etc.* The ordinance under consideration delegates this power to the Board of Public Improvements. It has been repeatedly decided by the Supreme Court of Missouri that a power conferred by a charter upon the legislative authorities of a city cannot be delegated.

> "Municipal powers may be delegated; legislative powers can not. The latter imply judgment and discretion on the part of those who execute them, and a special confidence and trust on the part of those who confer them."

Accordingly it has been held that where the law confers upon the legislative body of a city power to do so, it may not delegate

To the mayor authority to prescribe material for street paving.

Ruggles *v.* Collier, 43 Mo. 353.

To the city engineer authority to determine dimensions of public sewers.

St. Louis *v.* Clemens, 43 Mo. 395;
Same case, 44 Mo. 19;
St. Louis *v.* Craemer, 52 Mo. 133.

To the mayor or another, authority to *prescribe manner in which* streets shall be macadamized.

Haegela *v.* Mallinkrodt, 46 Mo. 577.

To county clerk power to audit an account.

Saline Co. *v.* Wilson, 61 Mo. 237.

To committee authority to fix grade of street.

Thompson *v.* Booneville, 61 Mo. 282.

To mayor power to fix wharfage rates.

Mathews *v.* Alexandra, 68 Mo. 115.

To citizens authority to license livery stables.

St. Louis *v.* Russell, 116 Mo. 235.

To householders authority to license slaughter-houses.

City *v.* Howard, 119 Mo. 41.

To city engineer authority to prescribe materials for sewer.

City *v.* Wilshire, 47 Mo. App. 145.

To mayor authority to license peddlers.

Town *v.* Clayton, 50 Mo. App. 535.

To city engineer right to prescribe material for street paving.

King Hull Co. *v.* Hamilton, 51 Mo. App. 120.

That the regulation of the mode in which "wires, cables, tubes, etc., conveying electricity for light, heat and power," shall be placed underground involves the exercise of "judgment and discretion" goes without saying. Extreme differences of opinion have arisen with respect to the manner in which this much needed improvement should be made. Various cities have adopted various methods. Where many individuals are concerned and their conflicting interests are to be adjusted to the public convenience, the very nicest judgment and discretion is required. The City of St. Louis has delegated this very important and delicate function to a Board consisting of various heads of departments, in violation of the charter's requirement that the use of all streets shall be regulated by "*ordinance of the Mayor and Municipal Assembly.*"

The ordinance itself contains no regulation whatever except that wires shall be placed in alleys where practicable. It delegates to the Board of Public Improvements full power to determine the manner, time, material, safeguards, etc., which shall be observed. It enables that board to decide with respect to the relative rights and obligations of the various companies or persons having conflicting interests; how much of the street shall be occupied by one and how much by another; whether all wires shall be placed in a common conduit or in separate ducts; what precautions shall be taken against induction, fire, explosions and other consequences of improper insulation. It is hardly neces-

ary to argue that these questions involve the exercise of judgment and discretion of the highest and most impartial order.

For the foregoing reasons we insist that there were no valid municipal regulations in force when the plaintiff applied for permission to excavate the streets. No rules had in fact been promulgated, even by the Board of Public Improvements; and if such rules had been promulgated, the board was not at liberty to grant to plaintiff a permit, notwithstanding its expressed assent to, and offer to literally comply with such rules. The ordinance prohibited a permit except to such persons, associations or corporations as *had prior to 1892* assented to the provisions of the general ordinance, or been thereafter authorized by a special ordinance. Under such circumstances an application to the Board must necessarily have been futile. The plaintiff had not prior to 1892 assented to the general ordinance (for reasons hereafter stated) and the Municipal Assembly refused its subsequent assent. The Board could not therefore have issued a permit to plaintiff even if its plans had in all respects been approved.

We have perhaps been unnecessarily diffuse in the discussion of this branch of the case, but its immediate bearing upon the relief prayed for demanded an exhaustive consideration.

Plaintiff's charter distinctly confers upon it the right "to establish and lay down in any portion of the corporate limits of St. Louis" all pipes, fixtures *or other thing* properly required in order to do" the business for which it was created, with one proviso, to wit: that "the same shall be done with as much despatch and as little inconvenience to the public as possible." (Trans., p. 5.)

Assuming, for the reasons above stated, that there was no ordinance passed by the Mayor and Municipal Assembly within the meaning of the city's charter, regulating the

manner in which the pipes, fixtures or things should be laid, the plaintiff is bound to observe the mode pointed out by its charter only, and this it has offered to do. The petition alleges that plaintiff

> "in order to provide a more effective service, has made arrangements to lay its wires underground according to approved and practicable plans and is now ready to do so with as much dispatch and as little inconvenience to the public as possible." (Trans., p. 8.)

2d.

Ordinance void because it exacts five per cent tax on gross receipts. That a corporation's charter which is in terms unalterable and irreparable is an inviolable contract within the meaning of the constitution of the United States, cannot now be controverted.

> Dartmouth College case, 4 Wheat. 518;
> Louisville Gas Co. *v.* Gas Co., 115 U. S. 683;
> N. O. Gas Co. *v.* Light Co., 115 U. S. 650;
> M. & O. R. R. Co. *v.* Tennessee, 153 U. S. 486;
> State *v.* Laclede Gas Light Co., 102 Mo. 472.

It seems equally obvious that a law which exacts a percentage of the gross receipts of a company, in addition to the ordinary taxes assessed upon its property, impairs the rights conferred. If not, then the city may exact ten, twenty or fifty per cent of such receipts and indirectly prevent the exercise of such rights. Where a right or privilege is conferred by a charter, what impairs the value of the privilege, impairs the obligation of the contract. The tax under consideration cannot be regarded as a police regulation.

> "A police regulation must have reference to the comfort, welfare or safety of society; it must not be

in conflict with any provision of the charter, and must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, it must be a police regulation in fact and not an amendment of the charter in curtailment of the corporate franchise."

Cooley Const. Lims., 5th ed., 712;
State *v.* Laclede Co., 102 Mo. 486;
Rushville *v.* Gas Co., 15 L. R. A. 321; 132 Ind. 575;
Mayor *v.* R. R. Co., 32 N. Y. 261.

3d.

Ordinance void because it wholly prohibits what charter authorizes. For reasons already set forth, we deny that the ordinance under consideration is a regulation. It does not regulate: it prohibits. Not even the Court below could escape this conclusion. It therefore frankly holds that although the ordinance "wholly prohibits" the undergrounding of wires, it is still valid because the plaintiff is now being permitted to use the streets "in the method now in use in the city." That the ordinance does not admit of this construction is clear upon an examination of its terms. It does not purport to discriminate between overhead and underground wires. *Both methods* of distribution are expressly allowed under the conditions prescribed.

Section 581 as amended provides that

> "*No wires, tubes or cables* conveying electricity shall hereafter be placed *along or across* any of the streets, alleys or public places of the city by any person, corporation or association"

who had not prior to October, 1892, accepted and complied with the general ordinance of 1887 or been authorized by a special ordinance of the Municipal Assembly.

Section 582 provides that

> "All such wires, tubes or cables along or across any of the streets, etc., shall be placed at such distance *above or below* the surface of the ground, and secured in such manner as shall be prescribed by the Board of Public Improvements." *Ante*, p. 40.

Not one word is said which warrants the conclusion that the Municipal Assembly intended to prohibit the undergrounding of wires by a person who maintained an overhead system. On the contrary, it expressly appears by the ordinance that *either or both* methods of distribution may be adopted by *any licensee* of the city who *will agree to pay the five per cent tax*. Neither method is allowed to plaintiff because it has not the city's consent and has not agreed to pay the tax. If the ingenious suggestion of the Court below be adopted by this Court, it will have the effect of validating the *conditions prescribed* by the ordinance. In other words, if only such persons as have permission from the city and will agree to pay five per cent of their gross receipts are allowed to use both overhead and underground methods of distribution, then the fact that plaintiff has not such permission and has not agreed to pay the five per cent tax is the sole reason why it is prevented from going under ground.

It appears upon an analysis of the ordinance that it prohibits any person from stringing wires along or across the streets, unless such person:—

1st, had prior to October 26, 1892, accepted and complied with the provisions of Art. II, of Chapter 15 of the Revised Ordinances, or shall be duly authorized by the Municipal Assembly; nor unless he shall

2d, file in the office of the Board of Public Improvements an application for a permit stating in detail, and

showing by plat, the streets to be occupied, and the manner in which the wires, cables, etc., shall be secured; nor unless he shall

3d, obtain a permit from said Board containing such restrictions and regulations as it may prescribe; nor unless he shall

4th, file with the City Register his acceptance of all the terms of the general ordinance, and agree in writing to file with the Comptroller of the city on the first days of January and July of each year a statement of his gross receipts from the business of supplying electricity for light and power for the preceding months, verified by affidavit; nor unless he shall agree

5th, that he will at the time of filing such statement pay into the city treasury five per cent on the amount of such gross receipts; nor unless he shall

6th, file with the City Register his penal bond in the sum of $20,000 with two sureties, to be approved by the Mayor, conditioned that he will comply with all the regulations of the Board of Public Improvements, make the statements and payment required as above, and save the city harmless from all damages by reason of the exercise of the privileges conferred (Trans., p. 52).

That such an ordinance is not a police regulation goes without saying. It is a revenue law. Its object is not to preclude a person from using both methods, but to *allow both methods* on payment of the tax, and exclude *either* method without payment of the tax. If the plaintiff had applied for permission to string an *overhead* wire and excavate a street for such purpose, the city might within the interpretation put upon the ordinance by the Supreme Court of Missouri, have refused to permit on the ground that the ordinance allowed the undergrounding of wires and that therefore the other method was precluded except under

the condition prescribed. The city has in fact refused a permit to plaintiff for either system, and that it was the purpose of the ordinance to justify such refusal does not admit of question. To give effect to the conditions prescribed is not therefore to secure proper methods of distribution or confine the company to one of two methods, but to preclude it from doing what all other persons, corporations and associations are permitted to do who will pay the tax and procure the consent of the city.

If the plaintiff in error had submitted to the Board of Public Improvements, plats and specifications showing in detail the work to be done, and the board had in all respects approved such plans, etc., still under the ordinance it must have withheld a permit, for two sufficient reasons:—

First, because plaintiff had not a license from the city.

Second, because it had not agreed to pay five per cent of its gross receipts into the city treasury.

The sole question therefore, is, are the conditions prescribed by the ordinance valid with respect to the plaintiff. Whether an ordinance prohibiting any person who maintained an overhead system from placing wires underground, would have been valid, is not in any way involved in this controversy. No such ordinance has been adopted. This is the sufficient answer to the Court's suggestion.

It may perhaps be suggested that plaintiff should, with a view to laying the foundation for this action, have submitted its plans, etc., for the approval of the board, so that the effect of the judgment of the Court will not be to allow an improper or inconvenient method to be adopted. There are several answers to this suggestion. In the first place the city has never based its refusal to allow an excavation on such ground. The contrary appears from the return filed. In the second place, for reasons already fully

set forth, we have believed that the Municipal Assembly has not power, under the city's charter, to delegate legislative functions to the board. Lastly, the charter itself prescribes a sufficient regulation.

We have already discussed two of the conditions prescribed. That which requires the plaintiff to obey all regulations prescribed by the Board of Public Improvements is void because, under the charter of the city, the Mayor and Municipal Assembly must "*by ordinance*" regulate the use of the streets, and such a duty cannot be delegated. That which requires the payment of five per cent of gross receipts into the city's treasury is void because it impairs the value of the privileges conferred by plaintiff's charter, and to that extent impairs the obligation of its contract with the State.

The condition that the plaintiff shall not put wires under ground without the city's consent is directly violative of its charter. It prohibits plaintiff from doing what the charter says it may do. Section 5 of the act of 1857, as amended, provides that

> "the company may establish and lay down in any portion of the corporate limits of the city any pipe, fixture or thing properly required in order to light the city and make and vend gas, gas lights and gas fixtures, and any substance or material that may now or hereafter be used as a substitute therefor."

The ordinance, to quote the language of the Court below, "wholly prohibits" the laying of wires or tubes conveying electricity for the distribution of light in the streets, without the consent of the city. This consent the city has refused, as appears by the defendant's return. That such prohibition is void as impairing the obligation of plaintiff's charter does not admit of question.

Citizens R. R. Co. *v.* Memphis, 53 Fed. Rep. 732.

Conclusion. If it be adjudged by this Court that the acts incorporating the Laclede Gas Light Company are valid enactments within the meaning of the constitution of the State; that properly construed such acts now authorize said company to have, hold, exercise and enjoy the rights and privileges thereby conferred; that among such rights is the right to make and vend electricity or electric lights, as a substitute for gas and gas lights, and to establish and lay down in the streets of St. Louis pipes and fixtures properly required in order to carry on such business; and that the ordinance which prohibits the exercise of the privileges conferred is void because it impairs the obligation of plaintiff's contract with the State; then it follows that the judgment of the Court below should be reversed and this cause remanded with directions to make the writ of mandamus prayed for peremptory.

Section 35 of Article IV. of the Charter of St. Louis charges upon the Street Commissioner the duty of repairing, constructing, etc., the streets. Section 1335 of the Revised Ordinance 1892 (Sec. 1306 Revised Ords. 1887) provides that any corporation desiring to make an excavation in any improved public street for any purpose whatever shall apply to the Street Commissioner for a permit. The plaintiff made such application and a permit was denied. If the right to make the excavation be allowed, the duty of the Street Commissioner to issue a permit follows as a matter of course. To enforce this duty is the object of the present proceeding.

Before submitting the case, some reply ought perhaps to be made to the argument most strenuously urged below with respect to the consequence of a judgment in plaintiff's favor. If the writ prayed for is granted the city, suggested counsel for defendants in error, will be at the mercy of a pitiless monopoly. Its right to direct the mode in which its streets shall be used will be destroyed

Its power to protect public and private interests by the enforcement of proper regulations will be unavailing. All hope of revenue from the exercise of public privileges of enormous value will be annihilated. The Laclede Gas Company will have an absolute and independent right to appropriate so much of the public highways as its caprice or convenience may suggest. What it can not use, it may farm out to others, and thereby appropriate to itself a vast revenue from the use of public property. Public policy imperatively demands that such vast powers should not be confided to a private association.

The answer to this argument is obvious. If the State law confers such privileges, this Court must enforce it, however unwise, in its opinion, such an enactment may be. The people of Missouri intrusted to the legislature responsibilities which it alone could discharge. If it abused its powers, the confidence of the people was misplaced. No court can redress the wrong done.

No wrong has however been perpetrated. None of the vague fears of defendants have any foundation in law or fact.

Plaintiff has never refused to comply with any proper city regulations. The company complains not of any regulation, but of the refusal of the city to allow, under any circumstances, the exercise of its charter rights. If, as had been contemplated, plans and specifications had been filed with the Board of Public Improvements, for its approval, and an application for a permit predicated on such approval had been made, the Board could not, under the provisions of the ordinances in force, have granted such application. The Board is prohibited by the ordinance from issuing permits to any persons who have not the city's consent to string wires, and such consent has never been given to the plaintiff.

Nothwithstanding, therefore, any concession that the

company might make, short of surrendering forever and absolutely all rights under its charter, it could not obtain a permit. It has been compelled to resort to this proceeding. This is the true situation. That under such circumstances plaintiff ought to have redress is too plain to require argument.

One inconvenient consequence of establishing the plaintiff's charter to which counsel for defendants has repeatedly referred, ought not to be ignored by us. It is charged that plaintiff claims not only for itself the right to use the streets, but the right to farm out its privileges to others. No such claim of right is involved in this suit. The Supreme Court of Missouri has recently decided that public streets are held in trust for the benefit of the public, and that a law which authorizes another to lease or farm out any portion of the public property for his private benefit, violates said trust and is therefore void.

State ex rel. Underground Service Co. *v.* Murphy, 31 S. W. Rep.

We submit therefore that none of the alarming consequences forced upon the attention of the Court have any solid foundation in law or fact. The plaintiff is now competing with numerous other electric companies. It freely confesses the right of the city to regulate its operations. It never has exercised the right to sell or lease any part of its privileges. It comes into Court because it must. It asserts nothing but the right to do what its charter plainly authorizes it to do.

ISAAC H. LIONBERGER,
Of Counsel for Plaintiff in Error.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

MARCH 1, 1898.

No. 47.

THE STATE OF MISSOURI EX REL. THE LACLEDE GAS LIGHT CO., PLAINTIFF IN ERROR,

vs.

MICHAEL J. MURPHY, STREET COMMISSIONER OF ST. LOUIS, AND THE CITY OF ST. LOUIS.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

ORAL ARGUMENT OF MR. HENRY HITCHCOCK, FOR PLAINTIFF IN ERROR.

May it please the Court:

This was an original proceeding instituted in November, 1894, in the Supreme Court of the State of Missouri, in the name of the State of Missouri, at the relation of the Laclede Gas Light Company, against Michael J. Murphy, street

commissioner of the city of St. Louis. The object of the proceeding was to obtain a writ of peremptory mandamus requiring the respondent Murphy to issue to the relator a permit to make an excavation or excavations on a certain street or streets in the city of St. Louis, in order that the relator might exercise its charter privilege of laying electric light wires in underground pipes or conduits.

An alternative writ was issued in December, 1894, and thereafter such proceedings were had that on July 2, 1895, final judgment was entered denying the peremptory writ prayed for, and on the same day a writ of error from this court to reverse that judgment was sued out by the relator.

PROCEEDINGS IN THE CAUSE.

The proceedings in the courts below are summarized on pages 2 and 3 of my brief for the relator, but I desire to briefly call your Honors' attention to the character of the proceedings themselves.

When this bill was filed an alternative writ was issued, to which the respondent Murphy, then street commissioner of the city of St. Louis, filed a return in January, 1895. On January 24, 1895, the relator filed a special demurrer to certain parts, also a motion to strike out other parts, of the return. The cause was then transferred from the division of the supreme court from which the writ had issued to the court *in banc*, on the ground that it involved a constitutional question; and the demurrer and motion to strike out were fully argued, orally and on brief, before the court *in banc*. Subsequently that demurrer and motion to strike out were overruled and judgment entered denying the writ, upon certain grounds set forth in an opinion which was filed as part of the record in the cause—filed, your Honors will observe, at what was in fact an interlocutory stage of the proceedings.

The relator on June 21, 1895, filed a motion to set aside

that judgment and for leave to plead further, which was granted.

The relator on June 28th filed a reply to the respondent's return, containing averments of new matter and setting out in full a certain city ordinance which was pleaded in part only in the respondent's return. To this reply the respondent on June 29th interposed a general demurrer; also special demurrers, covering all parts of it. Thereafter, by leave of court and consent of parties, the City of St. Louis on July 1st entered its appearance as a party to said cause, intervening therein for its own interest, and, by like consent and leave, adopted as its own the return filed by respondent and respondent's demurrer to the reply filed by relator.

Thereupon, without further argument, the court *in banc* on July 2d made an order sustaining said demurrers for the reasons given in the opinion theretofore rendered in the cause and referred to as part of said judgment. The relator declined to plead further, and thereupon final judgment was entered denying the writ on the same day.

Your Honors will observe from this statement that the only argument had in the court below was upon the original *demurrer of the relator to the return of the respondent*. The opinion which was filed when that demurrer was sustained was afterwards referred to in the final judgment, as part thereof, and as containing the reasons for which *the respondent's demurrer to the relator's reply* was sustained.

I wish also to call the attention of your Honors to the fact that there were certain questions of importance presented by the averments of new matter in the reply, which were not in the cause nor before the court at the time that that opinion was filed, and to which I shall presently direct your Honors' attention more particularly.

Mr. Chief Justice FULLER: I should like to know under what system that street superintendent acted, whether he was in subordination to some board or particular part of the

municipal government of St. Louis or whether he acted independently.

Mr. HITCHCOCK: The relator applied to the street commissioner for a permit to excavate a certain street in order to lay its pipes. The street commissioner, as such, was charged with the supervision of the streets and, as such, was alone authorized by ordinance to issue such permits to persons authorized to make excavations therein. Relator claimed the right, under its special charter, to lay its pipes for the purposes of its business and to make the necessary excavations therefor. The street commissioner refused to issue to relator any permit for such purpose, threatening to arrest any one employed by relator therefor. This proceeding was based upon that refusal; which is justified by the respondent, the street commissioner, and by the City of St. Louis, which afterwards entered its appearance as a party to the suit, on the ground that relator had not complied with the requirements of a certain city ordinance in respect to the laying of underground electric wires. Relator contends that those requirements are in violation of its rights under its charter, and that to enforce said ordinance against it would be to impair the obligation of the contract by the State with relator contained in said charter; and that is the Federal question in this case.

I proceed, if your Honors please, to state, in a brief and summary way, the contents of the pleadings.

AVERMENTS OF PETITION.

The petition avers the corporate character of the relator company and that it was incorporated originally by the Act of March 2, 1857, which was amended by the Act of March 26, 1868. Those Acts are set out in full in the petition. It is not necessary nor is there time to read them in full, but I call the attention of your Honors to the more important provisions of each of them.

Act of March 2, 1857.

The first section of that Act incorporates certain named persons *per verba de presenti* as a body politic and corporate, under the style of "The Laclede Gas Light Company," provides for their perpetual succession, and grants them the usual corporate powers. Under the decision in *St. Jo., &c., vs. Shambaugh*, 106 Mo., 566, the words "are HEREBY CREATED and constituted a body politic," &c., being a present grant of corporate powers, without any condition precedent, the corporation came into being upon the acceptance of the charter by the organization which was effected in 1857, as admitted by the pleadings.

Section 2 provides that the capital stock of the company shall be $50,000, and that the same may be increased to $2,000,000, divided into shares of $100 each.

The fourth section provides that the corporators or a majority may *at any time* open books in the city of St. Louis for subscription to the capital stock, and upon $50,000 being subscribed may organize under the charter.

The fifth section grants to the company within that part of the then corporate limits of St. Louis not embraced within the city limits as established by a former city charter of February 8, 1839, certain *exclusive* rights and privileges. I would state, however, that by the Act of March 3, 1857, the words "sole and exclusive" were struck out of this section of the Act of March 2, 1857, and relator in its petition expressly disclaims any *exclusive* privileges. Thus amended, the fifth section of said act grants to the relator—

"The privilege and right of lighting the same [the city of St. Louis, except as above stated] and of making and vending gas, gaslights, gas fixtures, and of any substance or material that may be now or hereafter used as a substitute therefor, and to that end may establish and lay down in said portion of said corporate limits all pipes, fixtures, or other thing properly required in order to do the same (the

same to be done with as much dispatch and as little inconvenience to the public as possible), and shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company."

The corporate powers and privileges thus granted to relator were afterwards extended by the amending Act of March 26, 1868, over the entire city limits, and to be held and enjoyed by relator *forever*. Those are the powers, thus enlarged both as to duration and territorial extent, upon which we rely.

The sixth section provides that the city of St. Louis and said company may make any contracts they may deem to their mutual advantage in regard to the lighting of any parts of said portion of said corporate limits, or any other thing relating to the business and affairs of said company. It also provides that the city shall have the option, at the expiration of twenty years *from the organization* of the company, to buy the property of the company, but provides, further, that if the city shall not so purchase the property and effects of the company—

"Then this charter shall be *and the same is hereby renewed and extended for the further period of thirty years after the expiration hereof.*"

The seventh section makes it a penal offense, punishable by fine and imprisonment, for any person to interfere with the privileges hereby granted.

The eighth section exempts the Company and this Act from the operation of sections 6, 7, 13, 14, 15, 18, and 20 of article first of the Act entitled "An act concerning corporations," approved November 23, 1855. I shall call the attention of your Honors later on to the effect and importance of these exemptions.

The ninth and last section of said Act of March 2, 1857, is as follows:

"§ 9. This act shall take effect from its passage, and shall continue in force for thirty years."

Act of March 3, 1857.

By section 1 of this act, as already stated, the words "sole and exclusive" were struck out of section 5 of the act of March 2, 1857. By section 2, the sixth section of said act was amended by authorizing the city to purchase the company's property, under the twenty years' option, at its appraised value, without any addition of percentage. These provisions have no bearing on the present controversy.

Act of March 26, 1868.

The petition then sets out in full the amendatory Act of March 26, 1868, which your Honors will find on page 7 of the brief for relator.

I read section 1 in full, as follows:

"SECTION 1. The said Laclede Gas Light Company shall and may within the corporate limits of the city of St. Louis, *as the same are now or may hereafter be established*, exercise, have, hold, and enjoy *forever*, all the rights, privileges, and franchises granted to it by the fifth section of the act to which this act is amendatory, and may at any time lease, sell or dispose of any portion of said rights, privileges and franchises to individuals, associations or corporations intending or desiring to exercise the same within any portion of the limits aforesaid."

Section 2 authorizes said company to increase its capital stock from time to time to such amount as may be necessary to carry on its business.

Section 3 declares that nothing in this Act contained shall be construed as affecting the vested rights of the St. Louis Gas Light Company; which at that time held exclusive rights within those parts of the city embraced within the former city charter of 1839. Section 3 also repeals the sixth section of the Act of March 2, 1857, which, it will be remem-

bered, gave to the city of St. Louis an option to purchase the property and effects of the company at the expiration of twenty years from the date of its organization.

Section 4 repeals the amendatory Act of March 3, 1857. The fifth and last section provides that the Act shall take effect from its passage.

The petition then avers that said Act of March 2, 1857, so amended, constitutes relator's charter, under which it has organized and carried on business and which is in full force; recites the special privileges granted to relator by section 5 of that Act, as amended; avers that in 1873, by the so-called "Tripartite Agreement" between the city of St. Louis, the St. Louis Gas Light Company, and relator, the relator abandoned all claim to any *exclusive* right of lighting said city; states that in pursuance of its said charter relator has for a long time been engaged in the lighting business, both by gas and electricity; that it is lighting a part of the streets and alleys of St. Louis by electricity under a contract with said city having yet several years to run, and is furnishing both gaslight and electric light to many thousand private consumers; that for said business it has erected and maintains extensive and costly plants, both gas and electric; has laid and maintains both gas pipes underground and electric wires overhead without objection by said city, as well to supply private consumers as for fulfilling its said contract with the city for electric light; that for electric lighting it is necessary to transmit through wires electric currents of great power, which if accidentally diverted are dangerous to human life and property; and—

"That in order to avoid the increasing inconvenience and danger to the public necessarily incident to that method of distributing electric currents, and in order to provide more effective and proper service, relator has made arrangements to lay its wires underground along and under the streets of said city, according to approved and practicable plans, and is now ready to do so with as much dispatch and as little inconvenience to the public as possible."

The petition then avers that the respondent, Murphy, is street commissioner of the city of St. Louis, having as such the supervision and control of the streets thereof and the enforcement of city ordinances relating thereto, and that by section 568 of the Revised Ordinance (1887) of St. Louis it is provided that no person shall make or cause to be made any excavation on any public street, highway, &c., without written permission of the street commissioner, excepting certain kinds of public work therein specified.

It is then averred that on October 30, 1894, having given notice thereof to said street commissioner, respondent, relator began the work of excavating at a point on Broadway adjacent to its generating plant for the purpose of laying its wires under ground, which work was proper and necessary therefor, but that respondent stopped said work, causing relator's men to be arrested, and notifying relator that he would not allow them to excavate any street without a permit previously obtained from him; that relator then applied to respondent, as street commissioner, for such a permit, so that it might lay wires under ground for the purposes aforesaid in pursuance of its charter rights and privileges, but respondent arbitrarily and unlawfully refused and still refuses to issue to relator any permit to excavate any part of any street of the city for any purpose; whereby relator was and is by said street commissioner absolutely prevented from exercising one of its vested rights granted by the State of Missouri, to wit, its right to lay down in the streets of St. Louis all pipes, fixtures, or other thing properly required to carry on the corporate business of relator.

It is then averred that it was and is the duty of respondent, as such street commissioner, to issue such permit to relator, so that it may, without interference by the police or other city authorities, exercise its said charter powers; and relator, being without other remedy, prays for a writ of *mandamus* commanding respondent, as such street commissioner, to issue to relator a permit to make an excavation on Broad-

way, from Mound street to Olive street, as near the curb as practicable, in so far as such excavation may be necessary for laying relator's electric wires under ground, the same to be done with as much dispatch and as little inconvenience to the public as possible, and for such other process, orders, and remedies as to the court may seem meet.

Your Honors will perceive from these averments that the relator's petition was framed and this relief sought upon the theory—

That the relator is empowered by its charter to carry on the business of making and vending both gas light and electric light; that said charter also vests in the relator the corporate right and franchise, to that end, to establish and lay down in said city all pipes, fixtures, or other thing properly required in order to carry on said business, provided only that the same be done with as much dispatch and as little inconvenience to the public as possible.

That underground pipes for electric light wires are a thing properly required and necessary for conducting said business with the utmost safety and convenience, and to lay such pipes the streets must be excavated.

That relator, desiring to lay pipes for that purpose, applied for the permit to excavate required by city ordinance to the respondent, as street commissioner, said respondent as such commissioner being alone authorized to grant such permit.

That it was the legal duty of respondent to issue such permit to relator to enable it to exercise its charter right of laying such pipe by making such excavation without molestation by the police or other city officers; that by refusing such permit and threatening and causing the arrest of relator's workmen, thereby preventing relator from exercising its said right, respondent violated as well said vested corporate right of relator as his said legal duty as street commissioner, and that the performance of said legal duty by

respondent as such street commissioner should be compelled by the writ of *mandamus* herein prayed for.

RESPONDENT'S RETURN.

The material averments in the return to the alternative writ filed by respondent are as follows:

It admits the enactment of the several Acts averred in relator's petition, setting forth in substance the provisions of the Act of March 2, 1857, and of the Act of March 3, 1857, and those of the Act of March 26, 1868, in full, as averred by relator.

Your Honors will observe that the return expressly admits that by the Act of March 2, 1857, the corporators therein named were constituted a body corporate, with the powers and privileges therein set forth. No question has been or is made by either of the respondents here as to the validity of any provision of that Act.

I would also remind your Honors that in 1857 the State constitution in force in Missouri was the constitution of 1820; that this was superseded by the new constitution of 1865, which was in force in 1868, and the latter was superseded by the constitution of 1875, which is still in force.

Act of March 26, 1868.

The constitutionality and validity of this Act is assailed in the respondent's return on two grounds. It is averred to be null and void, *first*, as being in conflict with paragraph 2 of section 1 of article VIII of the constitution of Missouri, 1865, which forbids the legislature to pass any law *reviving* or *re-enacting* any prior corporate charter as to which certain specified conditions exist. In connection with this averment, it is alleged that the Laclede Gas Light Company, relator, did not *organize* within one year after the Act of March 2, 1857, took effect, nor did it *commence business* within

one year from the taking effect of that Act, and that therefore the Act of March 26, 1868, which it is averred was an Act *reviving* and *re-enacting* the Act of March 2, 1857, was in conflict with paragraph 2, section 1, article 8, of the Missouri constitution of 1865, and therefore null and void.

Said Act of 1868 is also averred to be null and void as being in conflict with section 4, article XXV, of the Missouri constitution of 1865, which forbids any Act (1) to be *revived* or *re-enacted* by mere reference to its title or (2) to be amended in the particular manner therein specified.

I shall hereafter call your Honors' attention particularly to these constitutional provisions and need not dwell on them at present.

It is further averred that relator's charter, by the terms of section 9 of the Act of March 2, 1857, expired on March 2, 1887.

Also that even conceding all relator's claims as to the Acts of March 2, 1857, and March 26, 1868, relator is not entitled to the relief here sought, because it has never been granted a franchise to make and vend electricity for any purpose, its franchises being confined to making and vending gas, gaslights, gas fixtures, and any substance or material used as a substitute therefor, and that electricity is not a substance or material.

The return states that relator has heretofore laid its pipes and fixtures beneath the surface of Broadway from Mound to Olive street, and elsewhere beneath the surface of streets in St. Louis, to supply gas to consumers in said city; that to convey electricity *it is necessary to carry the same either by means of wires strung on poles above the surface or by means of wires strung in non conductive tubes or conduits beneath the surface of the streets*, and relator has never acquired from the State of Missouri or from the city of St. Louis any right to place such wires above or beneath the streets of said city; that section 2721, article 5, chapter 42, of the Revised Statutes of Missouri, 1889, provides that no company shall

place its wires or fixtures under ground in any city unless it has first obtained the consent of the municipal authorities.

It is further averred that it is provided by article 2, chapter 15, Revised Ordinance of St. Louis, 1887, as amended by ordinance No. 16894, that—

"No wires, tubes or cables conveying electricity for the production of light, heat or power, shall hereafter be placed along or across any of the streets, alleys or public places in the city of St. Louis, by any person, corporation or association not having, previous to the passage of this ordinance, accepted and complied with ordinance No. 12723, now amended, *or shall be duly authorized by the municipal assembly*, and then *only upon condition* that such person, corporation or association, *so authorized by ordinance*, before placing its wires, tubes and cables under ground shall file in the office of the board of public improvements an application therefor, stating in detail the streets, alleys and public places which said wires, tubes and cables are to occupy, and the manner in which said wires, tubes or cables are to be secured or supported and insolated, together with a plat showing the route of such wires, tubes and cables; and that thereupon, if the same is approved, the board of public improvements shall grant a permit therefor, subject to such restrictions, regulations and qualifications as may be prescribed by said board, and all such work shall be done under the supervision of and to the satisfaction of the supervisor of city lighting."

It is then averred—

"That relator has never accepted the provisions of said article and chapter, nor of said ordinance No. 16894, *nor has it ever been authorized by the municipal assembly of St. Louis* to place its wires, tubes, and cables under the streets and alleys of St. Louis."

I would respectfully call the particular attention of your Honors to the averments which I have just read, and also to those which follow them, namely:

"Respondent further shows unto the court that said ordinance provisions are legal and binding and valid provisions

and such as the city of St. Louis had the right to adopt and enact under paragraph 2 of section 26 of article III of the charter of St. Louis, which gives said city the power to regulate the use of all streets, avenues, alleys, and so forth, in said city, and such ordinance provisions are legal enactments, *notwithstanding any rights which relator now has or may heretofore have had by virtue of any Act of the General Assembly of the State of Missouri.*"

It is then averred that relator has never made application to the board of public improvements for a permit to place its wires, &c., under ground, nor has complied in any manner with the ordinance provisions aforesaid, and that respondent has not the power to grant any such permit as asked for by relator in this case.

The only remaining averments in said return are, in substance, that on March 2, 1857, the art of lighting by electricity was wholly unknown, and was also wholly unknown to art on March 26, 1868, and that neither by the Act of March 2, 1857, nor by the Act of March 26, 1868, did the General Assembly of Missouri confer or intend to confer upon relator the right to manufacture and vend electricity for lighting purposes.

I desired to call your Honors' attention to the averments of the return which I read a moment ago, setting up as a defense to this proceeding the city ordinance forbidding electric light wires to be placed under ground unless certain prescribed conditions have been fulfilled, because upon those averments and the issues tendered by them arises the crucial question in this case. As already stated, that return was filed on January 14, 1895, by Murphy, the sole respondent. Relator demurred to it upon grounds which need not be stated now, since that demurrer was overruled, and a reply was afterwards filed by relator. The reasons for which the court below overruled that demurrer are stated in its opinion filed on June 18, 1895—the only opinion rendered by that court, and upon the only

argument heard by it in the cause. The court said that inasmuch as the city of St. Louis was not a party to the cause, they did not deem it necessary to pass on any questions *that did not directly concern the duties of the street commissioner.*

But your Honors will observe that the defense set up by the street commissioner in the averments I read just now was based, not upon any ordinance which directly concerned his duties as such, but upon a general ordinance which prescribed certain conditions to be fulfilled before any person or company should have the right to lay electric wires under any city street. In that ordinance the street commissioner as such is not mentioned nor does it prescribe any duty for him or confer any power upon him. In setting up that ordinance as a defense the street commissioner not only undertook to pass upon the validity of the charter rights claimed by the relator, and in pursuance of which he was informed, as the petition states without contradiction, that a permit to excavate was asked from him, but he asserts, in so many words, that the mandate of the city is of superior force and obligation to that of any grant or contract by the State. The express averment of his return is "that said ordinance provisions are legal and binding and valid provisions and such as the city of St. Louis had the right to adopt and enact, *notwithstanding any rights which relator now has or may heretofore have had by virtue of any Acts of the General Assembly of the State of Missouri.*"

In other words, aside from the objections to the validity of relator's charter, the defense set up in the return was in effect that, no matter what its charter powers or rights might be under the grant from the State, the relator could not exercise those rights *until the Municipal Assembly of St. Louis gave it permission to do so.* Not the Board of Public Improvements. The functions of that body under that ordinance, however important, were secondary and subordinate only. The first and indispensable condition was to obtain

authority from the Municipal Assembly to lay underground wires. It is only "such person, corporation or association *so authorized by the Municipal Assembly*" who may file with the Board of Public Improvements an application for a permit to lay wires under ground. That Board is not authorized to receive, much less to approve, any application offered to them by any person or corporation not *so authorized by the Municipal Assembly*. An application to that Board by any person or corporation not *so authorized* for a permit to lay underground wires would be simply futile. The Board would reply—they would be obliged to reply, if they obeyed the ordinance, from which alone they derived any authority in the premises—that having no authority to approve any application from such person, they had no right to entertain it.

That was the defense set up by the respondent Murphy, as street commissioner, in his return as sole respondent, and that defense, as set forth in that return, was afterwards adopted as its own by the city of St. Louis, when by consent and leave of court it intervened for its own interest, entered its appearance, and became a party to the cause. Meanwhile the relator had filed its reply to the return, and to that the respondent Murphy had interposed his demurrers, general and special, and those demurrers also the city of St. Louis, by consent and leave, adopted as its own. And so the issue of law was joined upon the question—the chief and vital question in this cause—whether the mandate of the city of St. Louis or the grant and contract of the State is of superior force and obligation?

RELATOR'S REPLY.

Passing over the demurrer to that return, which was overruled, I may say that, in the reply to the respondent's return, the relator supplied certain provisions of that ordinance which were not pleaded in the respondent's return. The entire ordinance was set out in full in the reply.

The reply was filed on June 28th. It set out the following additional facts:

That by section 8 of the Act of March 2, 1857, the relator and said Act incorporating it were exempted from the operation of certain sections of the general corporation Act of November 23, 1855, already mentioned, of which sections 6 and 7 are the two important ones.

Section 6 provides that if any corporation hereafter created by the legislature shall not organize and commence business within one year, its corporate powers shall cease.

Section 7 provides that the charter of every corporation hereafter granted by the legislature shall be subject to alteration, suspension, and repeal in the discretion of the legislature.

Special charters containing such exemptions from certain provisions of the general incorporation law of 1855 were frequently granted by the Missouri legislature up to the time when the constitution of 1865 was adopted. The customary phrase employed in such charters was simply that the company named should be "exempt from the operation of sections 6, 7, 13," etc. That was the language of the charters in the cases of The Home of the Friendless *vs.* Rowse, and Washington University *vs.* Rowse, in 7th Wallace, in which those two corporations were held to have perpetual exemption from taxation. The exemption from taxation being expressly declared, the further provision that the corporation should be exempt from the operation of section 7 of the general corporation Act of November 23, 1855, was held by this Court to render it an irrepealable contract by the State.

The reply avers that, being so exempted from the operation of section 6 of that Act, the relator was not required to organize or commence business within one year from the date of incorporation, and, being also exempted from the operation of section 7, relator's charter became and was a contract between the State of Missouri and said corporation,

which contract was not subject to alteration, suspension, or repeal by the legislature of Missouri or by any provision of the constitution of the State subsequently adopted, except with the consent of said corporation. Moreover, it is averred that in virtue of the provisions contained in said charter, especially in sections 1 and 4 of the Act of March 2, 1857, the corporators and stockholders enjoyed the right to organize and to commence business *at any time* after the passage of said Act, without reference to the provisions of section 6 of the Act of November 23, 1855, and without reference to any Act of the General Assembly or of the constitution of the State thereafter enacted or adopted on that subject.

It then states, in substance, that under certain Acts passed in 1837 and 1839, incorporating the St. Louis Gas Light Company, which were in force in 1857 and until 1873, that company had certain exclusive rights and privileges by which relator was precluded from selling gas and gaslight in the city of St. Louis without the consent of that company, which was not obtained until 1873, and therefore relator did not begin to make and sell gas till 1873.

Respondent's allegation that relator did not organize as a corporation within one year from the time when said Act of March 7, 1857, took effect, is denied. On the contrary, relator avers that during the year 1857 all the corporators named in said Act met in St. Louis for the purpose of organizing said company thereunder and did then and there accept said charter and opened books for subscriptions to the stock of said company, said entire capital stock, to wit, $50,000, being then and there subscribed, and at said meeting said subscribers and stockholders organized said company by electing a board of directors and officers thereof, and it is averred that said corporation commenced business long before the year 1873.

The several averments in said return as to the alleged conflict between said Act of 1868 and said constitutional provisions are specifically denied: also the averment that

under section 9 of the Act of 1857 relator's charter expired in 1857; and it is expressly averred that, although relator was duly organized as a corporation during the year 1857, the city of St. Louis did not at the expiration of twenty years from the time of said organization, nor at any time, purchase or offer to purchase the property and effects of said company or any part thereof.

It is further alleged that even if respondent's averment that electricity is not a substance or material were true, which is denied, that averment is irrelevant and constitutes no defense to this proceeding.

It is then averred that the object for which relator was incorporated was to carry on the business of lighting the city of St. Louis, as well the public streets and alleys as the public and private buildings thereof; that by said charter was granted to relator the right and privilege of lighting said city and also of making and vending gas, gaslight, gas fixtures, and any substance and material that might then or at any time thereafter be used as a substitute therefor, and to that end relator was expressly empowered to establish and lay down in any part of the corporate limits of said city as then or thereafter established all pipes, fixtures, or other thing properly required in order to do the same, the same to be done with as much dispatch and with as little inconvenience to the public as possible.

I would respectfully call your Honors' particular attention to the next averments in the reply, which are copied in full on pages 18 to 20 of the brief for relator, but which I can only summarize.

It is averred that in order to light a city, or any street or space or building therein, artificial light must be produced, which is done by bringing to a state of incandescence or white heat any substance or material capable of being so used; and for that purpose relator's charter expressly authorized it to make and vend not only gas, gaslight, and gas fixtures, but any substance or material which might then

or thereafter be used as a substitute therefor, and to that end to lay down and establish at any point in said city all pipes, fixtures, or other thing properly required to do the same.

That illuminating gas is a highly inflammable compound of carbon and hydrogen, chemically combined, which, for the purpose of illumination, must be set on fire, thus decomposing the gas, setting free the carbon in fine particles, which become incandescent, producing what is called gaslight. But light may also be produced from carbon by means of electricity, to wit, by using pure carbon in the form of rods and filaments, which are made incandescent by passing through them what is called electricity, the result being that the carbon thus made incandescent gives out what is called electric light, which is of greater illuminating power than gaslight, and is commonly used as a substitute therefor throughout the United States for the illumination as well of public streets and places as of public and private buildings; and that the rights and privileges granted to relator by its charter include the production of artificial light by making carbon or any other suitable substance incandescent by means of electricity, equally with the right of making carbon, in its compound form of illuminating gas, incandescent by the application of heat; carbon being in either case the substance or material which is made incandescent, thereby producing light, namely, by the application of heat when gas is used, while in the production of electric light pure carbon is used as a substitute for gas and is made incandescent by the application of electricity.

It is admitted that, as averred by respondent, relator has heretofore placed its pipes and fixtures beneath the surface of Broadway and other streets in said city for supplying gas to consumers; also, that in order to produce light by means of electricity it is necessary to use wires for conducting the same, and to support said wires either on poles above the surface, as relator is now doing under its contract with said

city, or in tubes or conduits beneath said surface. And relator's purpose in making the excavation on Broadway, mentioned in its petition, was to construct under ground a conduit for said wires, such conduit and wires being properly required for the production of electric light as a substitute for gaslight; and it is further averred—

"That the conduit and wires intended by relator to be so laid down are of the most approved description, such as are used for like purposes in other cities, said conduits occupying when completed a space not exceeding thirty inches in width under the surface of the street, with provision for access thereto at suitable intervals through manholes properly covered and protected, less than 40 inches in width at the surface of the street, the said conduits and manholes when completed and in use offering no obstruction whatever to the use of the streets for travel and traffic, and the danger to life and property which attends the use of overhead electric wires, such as relator is now using under contract with said city of St. Louis for the purpose of lighting the public streets and alleys therein, being entirely avoided by placing said wires in said conduits."

Respondent's averment that section 2721 of article V, chapter 42, Revised Statutes of 1889, provides that no company shall place its wires and other fixtures under ground in any city unless it shall first obtain consent from said city, through its municipal authorities, is denied, said section 2721 applying exclusively to telephone and telegraph corporations organized under said article V of the general corporation law of Missouri. If said section 2721 purported to apply to relator its provisions would be void as being in conflict with its charter.

It is admitted that the municipal authorities of St. Louis did, by the ordinance mentioned in respondent's return, undertake to prescribe conditions for placing wires, tubes, and cables conveying electricity along, across, or under the streets and alleys of the said city: but that such ordinance is only in part set forth in said return and is set out in full in relator's reply.

Your Honors will observe that in the respondent's return this ordinance is referred to by section numbers of the Revised Ordinance of 1887, while in relator's reply the section numbers given are those of the Revised Ordinance of 1892, in and by which the ordinances mentioned by respondent were re-enacted. It is expressly averred that sections 603 to 614, inclusive, of said Revised Ordinance of 1892, which are set out in full in the reply, were and are since April 17, 1893, *the only existing ordinances of said city prescribing any conditions in respect of such electric wires*, and are the ordinances referred to in said return. This ordinance appears in full on pages 52 to 55 of the printed record in this case, and sections 603 to 606 and 612 to 614, inclusive, which are the only sections pertinent to this controversy, are given in full on pages 21 to 23 of the brief for relator.

It is admitted that relator has never accepted the provisions of said ordinance, and has never been authorized by the Municipal Assembly of St. Louis to place its wires, tubes, and cables under the streets and alleys of St. Louis, it being averred that said ordinances are not valid so far as relator's charter rights are concerned, said city having no power to enforce the same against relator, either under paragraph 2 of section 26, article III, of the city charter, or under any other provision thereof, because relator's charter, by reason of the exemptions in section 8 of the Act of 1857, is a contract by the State of Missouri with relator, not subject to repeal or alteration by said city or any municipality thereof, and the enforcement against relator of said ordinance would impair the obligation of said contract, in contravention of section 10 of article I of the Constitution of the United States, upon which relator relies for the protection of its rights.

Said reply further avers—

"That the only condition annexed by its charter, as amended, to the exercise by relator of its right to establish and lay down in said city all pipes, fixtures, or other thing

properly required in order to carry on relator's said lighting business is that the same shall be done with as much dispatch and as little inconvenience to the public as possible; and avers not only that in making its arrangements and preparations to lay its wires under ground along and under the streets of said city, as in its petition in this behalf alleged, and in applying to respondent, as street commissioner of said city, for a permit to make the necessary excavation therefor, *relator has fulfilled every condition to which it was or is lawfully subject in that behalf*, but also that respondent in refusing to relator such permit *did not allege as a ground for such refusal nor did in fact refuse such permit for the reason* that by laying its wires under ground in the manner by it proposed relator *would cause any inconvenience to the public*, but expressly and unconditionally refused to permit relator to make any excavation in any street of said city."

Finally, it is averred that as against relator said ordinances are not valid, legal, or binding enactments, nor constitute any defense to this proceeding—

Because they are not lawful or reasonable regulations of the use of the streets, but prohibit relator from exercising its charter rights except upon conditions which the city has no lawful right to impose upon relator, including the condition that relator shall be first duly authorized thereto by the Municipal Assembly; thereby impairing the obligation of the contract contained in relator's charter.

Because the enforcement against relator of the conditions prescribed by said ordinance would not be a lawful or reasonable exercise by the city of its charter power to regulate the use of streets, or of its police power, but an attempt by the city under color of said powers to compel relator to enter into the obligations and pay the tax and give the bond required by said ordinance; all of which are a denial of relator's rights and impair the obligations of said contract.

Because the provisions of said ordinance authorizing the Board of Public Improvements to prescribe regulations for the use of the streets, and requiring all persons obtaining a

permit from said Board as a condition thereof to agree to comply with all regulations made by said Board is not warranted by the city charter, which requires that the power to regulate the use of the streets therein granted to the Mayor and the Municipal Assembly shall be exercised by ordinance, and does not authorize the delegation of said power to the Board of Public Improvements.

Also because the several conditions prescribed by said ordinance are not independent of each other, but must each and all be complied with under the penalties in said ordinance provided; so that the relator would be subject to said penalties unless, before placing any of its wires under any street of said city, it shall not only have obtained authority therefor from the Municipal Assembly, but shall also have made application to the Board of Public Improvements for a permit, in the manner prescribed, and shall have obtained a permit from said Board of Public Improvements, with such restrictions and regulations as by it prescribed, and shall also have filed with the city register its bond in $20,000, conditioned as prescribed by said ordinance, and its acceptance and the agreement therein required, including an agreement to file sworn semi-annual statements of its gross receipts, and to pay an annual tax of 5 per cent. thereon; all which requirements are a denial of relator's charter rights and impair the obligation of said contract.

Wherefore relator denies that it was under any legal obligation to apply to the Municipal Assembly of said city for authority, or to the Board of Public Improvements for a permit, to place its wires under ground, and avers that it was the duty of respondent, as street commissioner, to issue to relator a permit for an excavation such as applied for.

Relator also denies that either on March 2, 1857, or on March 26, 1868, lighting by electricity was unknown to art, averring, on the contrary, that long before 1857 electricity was used for illuminating purposes, and apparatus had been publicly exhibited to great numbers of persons by means of

which electric light was produced substantially as hereinbefore set forth.

DEMURRER TO REPLY; FINAL JUDGMENT.

As already stated, the respondent Murphy filed on June 29th a general and special demurrers to relator's reply. On July 1st, by leave of court and consent of parties, the city of St. Louis, intervening for its own interest, entered its appearance in the cause and adopted as its own the return theretofore filed by the respondent Murphy, also adopting as its own the demurrers filed by Murphy to said reply. On July 2d, without further argument, said joint demurrers were taken by the court as submitted, and an order was made sustaining said demurrers for the reasons given in the opinion filed on June 18th, to which opinion reference was made as part of the judgment. On the same day, July 2d, relator declining to plead further, final judgment was rendered denying the writ, upon which, on the same day, July 2d, a writ of error from this Court was allowed, citation served, and on July 6th bond filed and approved.

THE QUESTIONS INVOLVED.

In the opinion of the Supreme Court of Missouri, overruling relator's demurrer and motion to strike out part of respondent's return, it was said that by said demurrer and motion the following issues of law were fairly framed:

"First. Is the Act of March 26, 1868, unconstitutional as being in conflict with section 2, article VIII, of the Constitution of Missouri of 1875?

"Second. Is said Act void as being in conflict with section 25 of article IV of said Constitution?

"Third. Did the charter of relator expire by limitation at the end of thirty years from the date of the Act of March 2, 1857?

"Fourth. Do the powers granted relator include the right

to manufacture, sell, or distribute electricity for lighting purposes?

"Fifth. Has the relator the right, under its charter, to place its wires under ground with the assent of the municipal authorities and *without compliance with the requirements of the valid ordinances of the city?*"

That is the way in which the fifth question is stated. In that opinion the Supreme Court of Missouri assumed, without deciding, the answer to the first four questions. It did not directly pass upon either of these questions, but assumed that the relator was an existing corporation, possessing all the powers, rights, and privileges its charter purports to confer upon it. The Court confined itself to the discussion of the fifth question—whether the relator had under its charter the right to place its wires under ground without the assent of the municipal authorities and without compliance with the requirements of the valid ordinances of the city.

If your Honors please, it was in answer to that question that the following statement was made in the opinion of the court below. It will be found on page 44 of the printed Record, and on page 35 of the relator's brief:

"*As the case is now presented*, we must hold that the city, under its power to regulate the use of streets and under its general police power, has the right to require a compliance with regulations which either *wholly prohibit relator from laying its wires under the streets* or which regulate the manner in which it may be done."

Relator denies the proposition that the city has the right to enforce regulations which, without regard to the provisions of relator's charter, should wholly prohibit it from laying wires under ground.

Obviously, the same power or right which would authorize the city to forbid relator to lay its wires under ground unless first authorized by the Municipal Assembly, would equally authorize the Assembly to arbitrarily withhold that au-

thority or consent. Such a right would be simply a right of absolute prohibition, and the Court below went that full length in the passage I have just read from its opinion.

Your Honors' attention has been called to the fact that this opinion was rendered upon *the relator's demurrer to the return*, and not upon the joint demurrer of the respondents to relator's reply, which was taken as submitted and sustained without argument, and, so far as we know, without any special consideration of the new matter contained in the reply or the specific objections to the ordinance complained of which were set up therein, and which I have just stated to your Honors.

Coming now to the questions presented by this record for the consideration of this Court, we suppose that since the relator claims that the enforcement of the ordinance complained of would be a violation of its charter rights, and would impair the obligation of the contract contained therein, it is incumbent upon the relator, first of all, to meet the respondents' challenge as to the validity of its charter and the nature of its rights. Unless the relator has a valid charter, and the right under it to lay electric wires, there is no contract the obligation of which can be impaired by the denial of that right.

Validity of Relator's Charter.

I shall therefore first consider the question of the validity of the relator's charter and its right to the privileges claimed by it thereunder.

Your Honors will observe that these respondents do not dispute the validity of the original Act of March 2, 1857, or any provision thereof. They deny the validity only of the amendatory Act of March 26, 1868. They also claim, however, that the Act of March 2, 1857, expired in March, 1887, in virtue of section 9, which provided that said Act should remain in force for thirty years, and that therefore the relator has no rights nor any standing in court, because, it is

said, since March, 1887, it has ceased to be a body politic, and, if it can be said to survive at all, can be nothing more than the attenuated ghost of a defunct corporation.

Assuming, nevertheless, that this spook of a corporation still has vitality sufficient for its immediate needs, I proceed to consider in its behalf the objections of my learned friend to the Act of March 26, 1868.

The first objection is based upon the provisions of article VIII, section 2, of the Missouri constitution of 1865, which is in these words:

"No law shall be passed *reviving* or *re-enacting* any Act heretofore passed creating any private corporation, where such corporation shall not have been organized and commenced the transaction of its business, within one year from the time such Act took effect, or within such other time as may have been prescribed in such Act for such organization and commencement of business."

To this we answer, *first*, that the Act of March 26, 1868, does not, nor does it purport to, *revive* or *re-enact* any Act whatever; and if that be true, it is not within the purview of the constitutional provision that "no Act shall be passed *reviving* or *re-enacting* any Act heretofore passed," &c. It does not purport to revive or re-enact; it purports to *amend*, and it does amend, by greatly enlarging and extending certain privileges already granted by the Act so amended.

In the case of *St. Jo, etc., R. R. vs. Shambaugh*, 106 Missouri, 567, the Supreme Court of Missouri expressly construed that clause of the Constitution in an opinion directly in point here.

Our contention is that no subsequent Act can be held unconstitutional and void on the ground that its enactment was in conflict with that clause of the constitution of 1865, unless (1) it is a law *reviving* an Act passed before July 4, 1865, or is a law *re-enacting* an Act passed before July 4, 1865; nor (2) unless the Act so *revived* or *re-enacted* was an Act creating a private corporation; nor unless (3) the corpo-

ration created by such original Act failed to organize and commence the transaction of its business either within one year from the time such Act creating it took effect *or within such other time as said Act itself prescribed.* All these conditions must be fulfilled or else the constitutional provision in question does not apply.

In the case of *The St. Jo R. R. vs. Shambaugh* the Supreme Court, construing that clause of the constitution, said:

"The above constitutional provision is not absolute, that is to say, it does not prohibit the legislature from enacting laws reviving prior Acts creating private corporations *in all cases.* The power to enact such laws remains in the legislature, except in the specified cases. Now, the Act in question does not on its face show that it comes within the prohibited cases. On its face it is a valid law. The principle of law is too well settled to call forth citation of authorities that an Act of the legislature will be presumed to be constitutional until its unconstitutionality is made to appear. There is nothing in this record to show that this Act falls within the prohibited cases. In the first place, the prohibition against reviving charters *implies that the charter to be revived is lifeless.* On this record the company was an existing one with perpetual succession *at the date of the alleged reviving Act.*"

That Court thus held that, even though in all other respects a given Act fulfilled the conditions I have just stated, yet if the Act to be revived *is not lifeless*, then it does not come within the prohibited cases. The Act of March 2, 1857, was not lifeless in 1868. My learned friend concedes that it was in full force until March 2, 1887. Therefore, under the decision in the *Shambaugh* case, it is excluded on that ground alone from the category of Acts which are within this constitutional prohibition.

Moreover, the Act of March 2, 1857, does not come within the description of an Act creating a private corporation which did not organize and commence business within one

year from the date of its incorporation, or such other time as the Act prescribed. Your Honors will remember that by section 8 of the Act of March 2, 1857, this relator was expressly exempted from section 6 of the general corporation law, which required all private corporations to organize and commence business within one year; also that relator was, by section 4 of that Act, authorized to organize *at any time;* and from the averment in the reply, not denied, but admitted by the demurrer, the fact appears that it did organize within one year, had its capital subscribed, and had its directors and officers appointed.

Thus from every point of view this Act is entirely without the purview of the clause of the constitution upon which this first objection is based.

My friend asks me whether we contend that we commenced business within one year. I reply that it is immaterial whether we did or not, because of the exemption from section 6 of the general corporation law I have just spoken of. We were not bound by that law at all, and that exemption applied equally to the general corporation Act of November 23, 1855, and to any subsequent Act or constitutional provision of like import, because the further exemption from section 7 of the general corporation law made our charter irrepealable.

I desire to call the attention of the Court to a point stated on page 61 of my brief more fully than I have time to state it now, as to the actual scope and intent of that constitutional provision. That provision was adopted in 1865, as section 2 of an entirely new article (VIII) concerning Banks and Corporations, then for the first time placed in the constitution of Missouri. Section 4 of that article provided that corporations might be formed under general laws, but should not be created by special acts, except for municipal purposes. Before 1865, as the voluminous statute books previous to that date show, hundreds of private corporations had been created by special acts, many of which had expired

by *non-user*. Men went to the legislature and procured all sorts of special charters which they thought might be handy things to have in the house, but which were never used. Many of these charters expired by *non-user*, under that section 6 of the general corporation law which I just now read, and from the operation of which relator's charter was exempted.

Now, the real and manifest purpose of section 2 of article VIII was to prevent these dead corporations from being resurrected by the passage of laws purporting to *revive* or *re-enact* those "lifeless charters." That is what the Supreme Court refers to in the *Shambaugh* case, when it says that the words "*revive*" and "*re-enact*" evidently contemplate that the charter to be *revived* is *lifeless*. It was the resurrection of that class of charters that this clause was intended to prevent.

But where no time was prescribed by the Act within which a corporation was to organize, *a fortiori* where the company was permitted to organize *at any time*, and in fact did organize within one year and was thereafter constantly in actual operation and in existence as a living corporation—where all these things concurred, I submit that I need give no further reason why that constitutional provision has no application whatever.

In other words, I thus summarize our answer to that objection, which your Honors will find more fully stated on pages 59 to 64 of my brief.

The Act of March 26, 1868, does not purport to *revive* or to *re-enact* the Act of March 2, 1857, but purports to be, and plainly is, an Act to *amend* that Act; something essentially different, and which was expressly held to be within the power of the legislature in *State ex rel. vs. Railroad*, 48 Missouri, 468, cited and affirmed in the *Shambaugh* case.

The Act of March 2, 1857, was not *lifeless* when the Act of March 26, 1868, was passed, but was in full force, and

therefore, according to the *Shambaugh* case, did not come within that provision of the constitution.

But my learned friend contends in his brief that the Act of March 26, 1868, did *re-enact* the act of March 2, 1857, because it confirmed and extended the provisions of the Act of 1857. He defines the word "*re-enact*" as meaning to enact over again—to enact the same thing over again. I accept that definition,—not only because it is correct but because it is fatal to his argument. The amendatory Act of 1868, so far from *enacting over again* the Act of March 2, 1877, made important changes in it, repealing some provisions absolutely and greatly enlarging others. It is simply an abuse of language to say that to so *amend* an Act is to *re-enact* it. To enact something entirely different is clearly *not* to "enact the same thing over again."

The next objection to the constitutionality of the Act of March 26, 1868, is found in section 25, article IV, of the constitution of 1865, which is as follows:

"No act shall be *revived* or *re-enacted* by mere reference to the title thereof, nor shall any act be *amended by providing that* designated words thereof shall be struck out, or that designated words shall be struck out and others inserted in lieu thereof; but in every *such* case the act revived or re-enacted, or the act or part of act amended, shall be set forth and published at length as if it were an original act or provision."

There are two distinct provisions in that section. The first is that no Act shall be *revived* or *re-enacted* by mere reference to the title. No objection on that ground can apply to the Act of March 26, 1868, for the obvious reason that it does not purport to either *re-enact* or *revive*, or in any way whatever to affect, any Act "*by mere reference to the title.*" It is, and purports to be, "An Act to *amend* an Act to incorporate the Laclede Gas Light Company, approved March 2, 1857," and it does *amend* that Act, not by mere

reference to its title, nor by any reference thereto, but by specific and detailed provisions.

Secondly, that section 25 provides that no Act shall be amended by the legislature *in the particular method or form* of enactment specified in that section. As to this prohibition, I submit, if your Honors please, that no amending Act can be held void as contravening it, unless such amending Act is *in the form* which this clause specifically describes and prohibits. Unless such Act amends a prior Act "*by providing that* designated words thereof shall be struck out, or *by providing that* designated words shall be struck out and others inserted in lieu thereof," it is not within this provision, and is not void for that reason; and the further provision that "in every *such* case the Act revived or re-enacted or the Act or part of Act amended shall be set forth and published at length, as if it were an original Act or provision," confirms our view by excluding every other form of amendment.

The argument made against the validity of the Act of 1868 under this head in the printed brief for respondents is, that in section 1 it refers to all the rights, privileges, and franchises granted to the company by the fifth section of the Act of March 2, 1857, which language, it is said, is unintelligible without reference to section 5 of the Act of 1857, and reads into the Act of 1868 the provisions of the Act of 1857, and that therefore it *in effect* does that which the constitutional provision in question forbids.

But I submit that our contention is conclusively supported both by reason and by the authorities.

The familiar rule or criterion for determining the proper construction of a new and remedial statute is that we should consider the old law, the evil, and the remedy. Now, we have only to look into any volume of the Session Acts of Missouri before 1865 to find abundant illustration of the evil intended to be remedied by this constitutional provision. I have given illustrations and instances of it on pages

67 and 68 of my brief. Before the constitution of 1865 a very cursory examination discloses that prior Acts were amended in at least six different methods or forms of enactment:

(1.) By adding entirely new sections.

(2.) By expressly repealing a section or sections, designated by numbers, and enacting different provisions on the same subject.

(3.) By enacting that a designated section or sections "be *so amended that*,"—after which the intended amendment is set out in full, sometimes differing entirely, and sometimes differing only in certain words, from the Act amended.

(4.) By enacting that an existing Act or a designated section or sections thereof "shall be, and is hereby, amended *so as to read*,"—and then the intended amendment is set forth, sometimes differing entirely, and sometimes only as to certain words, from the Act amended.

(5.) By expressly repealing a designated section or sections and enacting complete new sections, differing from those repealed only in omitting certain words or omitting certain words and inserting others.

(6.) Without adopting either of these five methods, by simply enacting that *designated words in the act amended shall be struck out* and other designated words inserted in lieu thereof. For example, the Act of November 23, 1863 (Acts 1863–'4, p. 112), amending the Act to provide for the State University (R. S. 1855, pp. 1494, 1499), which is in full as follows:

"SECTION 1. That the third section of the second article of the Act to which this is amendatory shall be so amended that the word *eighteen* be stricken out and *twenty-two* be inserted in its stead.

"This Act to take effect and be in force from and after its passage."

That is the whole Act. That precisely answers the description given in the constitutional provision we are considering, for it undertakes to amend an Act simply *by providing that* designated words shall be struck out and others substituted. That is the precise evil that it was intended to remedy. No other of the six methods I have indicated answers that description, and that meets it precisely.

But that is not true of the Act of March 26, 1868. That purports to be an amending Act, to amend the Act of March 2, 1857. But it provides, not that any designated words shall be struck out, but that the company incorporated by the former Act shall have and enjoy forever all and singular the privileges granted by the Act to which this is amendatory throughout all parts of the city of St. Louis as now or hereafter constituted. It adds new and substantive provisions to those of the former Act, by an enactment complete in itself, and which, under the decision of this court in *Humphrey vs. Pegues*, 16 Wallace, 247, at once, in legal effect, became a part of the Act so amended.

Without giving in detail the reasons set forth in my printed brief under this head, and which seem to me conclusively to support this view, I call your Honors' attention to a number of cases in which the Supreme Court of Missouri has settled beyond any question the proper construction of that constitutional provision.

In the case of *Mayor of Boonville vs. Trigg*, 46 Missouri, 288, which is the earliest and a leading case on that subject, the only question was whether the Act of March 23, 1868, amending in part section 1 of the Act of February 8, 1839, incorporating the city of Boonville, was invalid, as not complying with this same section 25 of article IV of the Constitution of 1865. I read from page 70 of my brief the first section of the Act of 1839, the original charter of Boonville, which was the Act amended, omitting only certain parts of the mere description of boundaries, as follows:

"SECTION 1. All that district of country within the following limits, to wit: Beginning at the mouth of the branch below and east of Boonville * * * (description of boundaries) * * * thence north to the beginning, shall be and is hereby erected into a city by the name of the city of Boonville; and the inhabitants thereof shall be and are hereby constituted a body politic and corporate by the name, etc., * * * (corporate powers set forth) * * * may have a common seal and make and alter the same at pleasure."

The remaining sections of the Act, neither of which was amended by the subsequent Act, provide in detail for the city government, etc.

The amending Act of March 23, 1868, reads as follows:

"SECTION 1. That *so much of section one* of an Act entitled 'An Act to incorporate the city of Boonville,' approved February 8, 1839, *as relates to the bounds and limits* of the city of Boonville, *be amended so as to read as follows:* 'All that district of country within the following limits, to wit: Beginning at the southeast corner of,' etc. (description of new boundaries), 'thence east, following said township line to the place of beginning.'"

That is the whole of section 1 of the amending Act, and is the only portion of said amending Act which purports to amend the Boonville charter. There is only one other section in the amending Act, and that relates exclusively to a special election, at which the amendment in the preceding section is required to be submitted to the people of Boonville for acceptance or rejection.

It was contended with great earnestness in that case that this amending Act was void, as coming clearly within the prohibition of section 25 of article IV of the constitution of 1865; and upon precisely similar grounds to those now urged here. It was urged that the amending Act did, *in effect*, if not literally, strike out certain words from the Boonville charter and substitute other words therefor; that the

amending Act was not complete in itself and was not even intelligible unless it was read into the Act amended; and I must say that there was some force in that contention. No such criticism applies to the Act of 1868, amending the Laclede charter, which is a perfectly complete enactment in itself; and the reference made to the 5th section of the Act amended for the particulars of the franchises mentioned is a familiar and perfectly proper method of compendious description.

The court below, in the case of *Boonville vs. Trigg*, held that the amending Act was within the constitutional prohibition, and was therefore void. But the Supreme Court of Missouri held the contrary. I have time to read only a sentence or two of the reasons given for their decision, which your Honors will find quoted more at length in my brief, on pages 72 and 73. After stating the evils in the way of obscure and doubtful legislation, which this constitutional provision was designed to prevent, and referring to and distinguishing certain provisions in the constitutions of Louisiana and Indiana which were relied on by the defendants, the Court said:

"The constitution in these States expressly declares that where a section is amended it shall be re-enacted and published at full length. But our constitution only requires the Act or part of Act amended to be set forth and published. That was done in this case. *There was no striking out or inserting words in lieu thereof, but there was an amendment of part of the Act, and the amendment was set forth and published entire. The constitution was strictly complied with.*"

That is the test they give. That is exactly what was done in the Act of March 26, 1868, amending the Laclede charter.

In several subsequent and very important cases your Honors will find that the doctrine of *Boonville vs. Trigg* was referred to and affirmed. There are a number of cases in later volumes of the Missouri reports, cases of greater importance than that in regard to the amendment of the

Boonville charter, in which the same objection was made, the same ruling had, and the doctrine of that case affirmed. Those cases are cited in my brief, on pages 74 to 79.

In *State vs. Chambers*, 70 Missouri Reports, 625, decided in 1879, the Court held that section 3 of the Act there in question furnishes an illustration of what was intended to be forbidden by section 34 of Article IV of the constitution of 1875, which took the place in that instrument of section 25, Article IV, of the constitution of 1865, being identical therewith, except that the latter clause added the words "together with the act or section amended," making it that much stronger. But even that provision was held to have exactly the same meaning. What was intended to be forbidden is pointed out by the Court in these words:

"If said section had only contained the words 'section 3 of said chapter 186 is hereby amended by striking out the words *assault, battery, affray, or other breach of the peace,*' in the third and fourth lines of said section, and inserting in lieu thereof the words '*a misdemeanor*,' the amendment *would have been in clear violation* of said constitutional provision."

That describes exactly what would have been a violation and is exactly the case I have put. But that is what our Act of 1868 does not do.

Three or four other cases, very important in themselves, also cited in my brief, follow the same ruling:

Morrison vs. St. Louis, I. M. & S. Ry Co., 96 Missouri, 602.

State vs. Miller, 100 Missouri, 439, where an Act was called in question relating to public schools in cities having over 300,000 inhabitants.

State vs. Bennett, 102 Missouri, 356, involving the constitutionality of the Act establishing the St. Louis Board of Police Commissioners. In that case there was a series of amendatory Acts, every one of which would have been in conflict with the construction placed upon the constitution by my

learned friend; but as to all of them the Supreme Court maintained the construction adopted in the Boonville case.

I will cite only one other case on this point, a case to which I have already referred, *St. Jo R. R. Co. vs. Shambaugh*. I cited it before for another purpose; but, if your Honors will take the trouble to examine the amendatory Act, which in that case was attacked entirely on different grounds—apparently because it seemed hopeless to renew the attack on the grounds we are now considering—you will find that it exactly corresponds with our amending Act of March 26, 1868; that is to say, so far as the question we have been considering was concerned, the Supreme Court of Missouri, in the *Shambaugh* case, assumed the validity of an amending Act in that form.

I desire also to mention, as I have more fully in my brief, that in the case of *State vs. Draper*, 47 Missouri, 29, affirmed in *State vs. Miller*, 100 Missouri, 446, as also in the case of *State vs. Heidorn*, 74 Missouri, 412, the Supreme Court of Missouri expressly held that, under the constitution of 1865, as under the constitution of 1875, it was competent for the legislature to repeal an Act by implication. The bearing of that will be observed later on in connection with another point in the argument. There can be no doubt as to the settled doctrine of the Supreme Court of Missouri on that question.

I also ask your Honors' attention to another case, which to my surprise I find cited in my learned friend's brief as an authority on his side of this question. It is the case of *The People vs. Mahaney*, 13 Michigan, 496, where Judge Cooley states with striking clearness and force the grounds upon which our contention here ought to be, as it was in that case, held valid. In that case the Court construed a constitutional provision intended to remedy similar evils with those contemplated by the provision we have been considering, but expressed in terms far broader than the latter—so broad as to include every case of an amended Act, in

whatever form amended. It is cited at some length on pages 79 and 80 of my brief, to which I beg leave to refer your Honors. Time permits me now to call attention only to the closing sentence of the quotation, which, however, sums up the argument in these words:

"But an Act complete in itself is not within the mischief designed to be remedied by this provision, and cannot be held to be prohibited by it without violating its plain intent."

[At this point the Court adjourned for the day.]

MARCH 2, 1898.

Mr. HITCHCOCK continued:

If your Honors please, a further proposition maintained by the respondent is that the charter of the relator expired in March, 1887. Our contention is, on the contrary, that by the amending Act of March 26, 1868, the duration of the charter of the relator was extended without limit. We contend that the legislature meant exactly what it said when in the first section of that Act it provided that the Laclede Gas Light Company should have and enjoy *forever* all the rights, privileges, and franchises granted to it by the fifth section of the Act of March 2, 1857. In the case of Humphrey *vs.* Pegues, 16 Wallace, 247, your Honors held that the legal effect of an Act amending a corporate charter is precisely the same as if the provision in the amending Act had been in the original Act.

The original grant in this Act of March 2, 1857, in section 9, limited the continuance of that Act to 30 years. I understand from the brief of my friend on the other side that his contention that this charter expired in March, 1887, is based on the proposition that whether the Act of 1868 was valid or was not valid, the duration of the Laclede Gas Light Company's existence terminated in March, 1887, in virtue of section 9 of that original Act. We think the an-

swer to that is very simple, and I shall merely state it without discussing it at length.

In the first place, it ignores the meaning of the word "forever." We must suppose that the legislature, when it passed the Act of March 2, 1868, meant what it said. "Forever" does not mean a period of nineteen years or any other limited period. In the brief of my friend, on this very question, it is conceded to mean unlimited duration.

But it is said that whatever might be the effect of the word "forever," considered by itself, we must take the whole Act together, and that section 9 limits the existence of the company to thirty years. Our answer to that is that section 9 was repealed by necessary implication. I have cited in my brief the cases of *State vs. Draper* and *State vs. Miller*, both expressly holding that the constitution of 1865—

"Has not said that when an Act is passed inconsistent with a preceding one, so that both cannot stand, the latter one shall be void and the earlier one shall prevail, but has left the law as it always has been, viz., that when two statutes are inconsistent and repugnant, the last one enacted shall be considered in force."

Our contention is plain that section one of the Act of March 26, 1868, which provides that this corporation should enjoy its privileges *forever*, is necessarily repugnant to and inconsistent with, and therefore repeals by necessary implication, section nine of the Act of 1857, providing that the charter of the company should cease at the end of thirty years.

There is another defect in the contention on the other side; it entirely ignores the provision of section 6 of the original Act, which was that the city of St. Louis should have the option at the expiration of twenty years from the organization of the Laclede Gas Light Company—not from the time when it should commence to transact business, but twenty years from *the date of its organization*—to buy the

property and effects of the company, and that if the city should fail to so purchase the property and effects of the company at that time, "then this charter shall be, and the same is *hereby, renewed and extended* for the further period of thirty years after the expiration thereof." In other words, it was a present grant of thirty years of additional corporate life, subject to be defeated by the contingency of the purchase, at a given time and in a given manner, by the city of St. Louis, of the property of the corporation. Now, it is not claimed that any such purchase was ever made or ever offered to be made. On the contrary, it is averred and admitted that no such purchase was ever made or ever offered to be made. The city's option therefore lapsed, and so far as the Act of March 2, 1857, alone was concerned, the provision for the thirty years' extension took effect. In other words, if the Act of 1868 either was void or had never been passed, the operation of section 6 of the original charter would *ipso facto* continue this charter to 1917. Of course, I am not contending that this is the correct view. I am simply pointing out an obvious and fatal inconsistency in the argument of my learned friend.

He has insisted at great length in his printed brief—and I assume that he will insist in his argument—that the amending Act of March 26, 1868, was in conflict with two express provisions of the Missouri constitution of 1865, and therefore was and is utterly void. In contemplation of law, as he contends, no such Act ever existed. Very well. If that be so, then section 6 of the Act of March 2, 1857, never was repealed; and if that be so, then, since the city of St. Louis failed to exercise its right or option under that section to purchase the company's plant at the time limited by that section, it follows that under the further express provisions of that section the company's charter was "thereby renewed and extended" for thirty years longer—that is, until March, 1917; but if that be so, then that charter did not expire in

March, 1887, and, so far from the company's being for ten years past the mere gibbering ghost of a corporation, it is the argument of my learned friend which has melted into thin air.

But, I repeat it, our contention is, not that this charter was extended by that section 6 to 1917, but that in virtue of the express grant in section 1 of the Act of March 26, 1868, the corporate life of this company is to endure *for ever*. We contend, for the reasons already stated, that the Act of 1868 was not void but valid in each provision and in every respect. The objections to its validity, based on the two constitutional provisions I have discussed, it seems to me have been shown to be wholly without force; and none others have been suggested, nor has the power of the legislature to enact it been otherwise questioned. Under the decision in *State ex rel. vs. Railroad*, 48 Missouri, 468, affirmed in *St. Jo, &c., Railroad vs. Shambaugh*, 106 Missouri, 569, cited on page 60 of my brief, the power of the legislature, under the Missouri constitution of 1865, to *amend* a corporate charter, previously granted by special Act, is not open to question, nor has it been questioned in this case. The decisions in *State ex rel. vs. Draper*, 47 Missouri, 29; *State vs. Heidorn*, 74 Missouri, 412, and *State ex rel. vs. Miller*, 100 Missouri, 446, cited more fully in my brief, on page 83, are equally conclusive that under that constitution an Act plainly inconsistent with and repugnant to an Act previously passed, but which it does not expressly repeal, must be held to repeal the prior Act by implication. It is tolerably clear, I submit, that a legislative grant of corporate franchises to be held and enjoyed *for ever* is in the highest degree inconsistent with and repugnant to a prior Act limiting the enjoyment of those franchises to thirty years. The words *for ever*, when used in a grant, whether statutory or by private conveyance, have only one possible meaning, that of unlimited duration. Certainly I need not argue that proposition—indeed, as I have said, that much is conceded in the

brief on the other side, even in the argument I am answering. But it must also be conceded, according to settled and reasonable rules of construction, that those words were used by the legislature in their ordinary and obvious sense. When the legislature said *for ever*, the legislature meant *for ever*. They did not mean *nineteen years*, as my learned friend contends that they did. In other words, they intended to repeal the limitation in section 9 of the Act of 1857, and they did repeal it, by necessary implication.

What answer is made to this by my friend on the other side? He undertakes to meet our contention, on our own theory that the Act of March 26, 1868, is a valid Act, and to show that even then the Laclede charter expired in March, 1887. His argument then rests on the proposition that since the legislature, when they passed the Act of 1868, did expressly repeal section 6 of that Act, but did not expressly repeal section 9, it must have been their intention to leave the latter section in force, and, upon this assumption, the unlimited duration which he concedes to be the meaning of the words *for ever* is limited and cut down to thirty years by section 9. This contention is stated on page 128 of the printed brief for respondent. He assumes, for argument's sake, the validity of the amending Act of 1868, and that the Act of 1857 is to be read as though the new provisions of the Act of 1868 were incorporated therein. So reading it, the grant of "perpetual succession" in section 1 remains unchanged. The corporate rights and privileges originally granted by section 5 are to be held and enjoyed by the company *for ever*. Section 6, which gave the city its option to purchase the company's plant after twenty years, is expressly repealed; and section 9, which limited the duration of the original Act to thirty years, not being expressly repealed, remains in force. He then sums up the result in these words:

"Thus section 1 confers the capacity of immortality; section 5 gives the company unlimited duration, and section 9 limits the life of the company to thirty years after March, 1857."

If this were a correct statement of the result of that amendment of the Act of 1857, I should entirely concur in the comment he then makes upon it when he adds: "I seriously doubt if greater statutory inconsistency can be found in the laws of any State."

Certainly nothing could be more inconsistent, I might say more preposterous and absurd, than such legislation, if any such result had been intended or could reasonably or fairly be inferred from the language of the Act. It does not seem to have occurred to my learned friend that the inconsistency, the absurdity, of such a result simply demonstrates the unsoundness of the argument which leads to any such conclusion.

It is a very familiar and a very sound canon of construction that when two opposite interpretations of a given instrument or statute are offered, one of which is reasonable in itself, and by adopting it all parts of the instrument are made consistent and harmonious, while the acceptance of the other would lead to uncertainty, confusion, or contradiction, the former is for that reason to be preferred, *ut res magis valeat quam pereat.* The presumption is certainly very strong indeed against imputing to the legislature any such intent as would justify the sharp criticism of my learned friend. On the other hand, the construction which we place upon the Act of 1858 is not only reasonable in itself, but avoids all obscurity, all contradiction, and renders the whole Act consistent with itself and with the settled law of the State, as contained in the decisions of the Supreme Court. There was no reason whatever why the legislature should not extend the duration of those franchises without limit, if it saw fit to do so. The words employed were apt to that end, and unless that was the

legislative intent it is inconceivable why those words were used at all. If the legislature did not intend to extend but did intend to cut down the duration of that charter; if they intended not only to take away the additional thirty years conditionally granted in the sixth section of the original Act, but to limit the charter to 1887, only nineteen years off, which is my friend's contention, why did they use the words *for ever* in the amending Act? There was no need of those words for that purpose—no sense or meaning in using them. On the contrary, they could only obscure and apparently contradict the supposed intent. The original Act, in section 1, already granted "perpetual succession"—which, for argument's sake, I may concede to mean only "*continuous* succession," or "the capacity of immortality," as contended by my friend—and all other ordinary corporate franchises, and section 9 already established the limit of their duration in March, 1887, unless extended to March, 1917, under section 6, by the city's failure to purchase. That option was taken away by the express repeal of section 6, which is entirely consistent with our view that the legislature intended to confirm those franchises *forever* to the company.

If not, I repeat, why were the words *for ever* used at all? I submit, that until that question is clearly and satisfactorily answered, my learned friend's interpretation of the Act is not even plausible. It is no answer to say that the legislature must have intended to leave section 9 in force, because they did not expressly repeal it. That is begging the question. We reply that section 9 was already repealed by necessary implication by the words *for ever* in section 1 of the amending Act, and to repeal it again by another section expressly added for that purpose was entirely unnecessary; and so I repeat my question, and shall await with interest my friend's answer to it. Why did the legislature use the words *for ever* in section 1 of the Act of 1868? Why were those words put in that section at all, unless they were used in their ordinary and conceded sense,

to express and confer *unlimited duration*, thereby *ipso facto* repealing and getting rid of any other provision in the original Act, inconsistent therewith?

But, if your Honors please, aside from the reasons and authorities so far submitted for the relator, there is another, and, as we think, a conclusive answer to all the respondents' objections to the validity of this charter. We maintain that that question is *res judicata*. In three successive decisions of the Supreme Court of Missouri, to each of which the city of St. Louis was a party, this very charter, granted by the Act of March 2, 1857, *as amended by the Act of March* 26, 1868, was adjudged to be valid and in force. The latest of those three cases was a proceeding brought in the Supreme Court by the city of St. Louis against the Laclede Gas Light Company, relator here, *in October, 1890*, more than three years after, according to my learned friend, that company's corporate life had expired. It was held not only that this company was then existing "by virtue of a special charter granted March 2, 1857, *as amended by an Act approved March* 26, 1868," but that its charter was an irrepealable contract by the State.

So many questions remain to be discussed that I can only allude to these three cases, referring your Honors to the statement of them on pages 85 to 92 of my brief. They are the cases of *St. Louis vs. St. Louis Gas Light Co.*, decided in 1879, reported in 70 Missouri, page 69; *St. Louis Gas Light Co. vs. St. Louis*, decided in 1885, reported in 86 Missouri, 495, and *State ex rel. City of St. Louis vs. Laclede Gas Light Co.*, decided at October term, 1890, reported in 102 Missouri, page 473. In each of those cases, as your Honors will find by reference to my brief, the question of the validity of the Act of March 26, 1868, was directly involved. In the earliest of them, which was a suit brought by The City of St. Louis against The St. Louis Gas Light Company and The Laclede Gas Light Company, relator here, in the circuit court, that court held the Act of March 26, 1868, unconstitutional and

void under article IV, section 25, of the Missouri constitution of 1865, upon the same grounds as are here urged. But on appeal by the St. Louis Gas Light Co., to which it is proper to state that the Laclede Company was not a party, that judgment was reversed, the Supreme Court expressly holding valid the said amendatory Act of March, 1868. To the second of those suits the Laclede Gas Light Company was not a party, but the same question was involved and directly decided by the Supreme Court as bearing upon the validity of the so-called "tripartite agreement" of 1873 between the city of St. Louis and those two companies, the Supreme Court again expressly holding valid the Act of March 26, 1868, and affirming the extension by that Act of the franchises granted to this relator by the Act of March 2, 1857. The third suit was, as I have said, a direct proceeding by the city of St. Louis against the Laclede Gas Light Company, relator here, for a writ of *mandamus* to compel the latter to reduce the price of its gas, as required *by city ordinance approved March 31, 1899.* The company's return set up its charter, *as amended by the Act of March* 26, 1868, as an irrepealable contract of the State, in virtue of which it had the right to fix the price of its gas without any control by either State or municipal legislation. To this the city filed a general demurrer, which, upon full argument, was overruled and the writ denied, in an opinion reported in the 102d Missouri, page 483, which not only expressly held valid the Act of March 26, 1868, but cited and approved the decisions in the two former suits.

Under these circumstances, if your Honors please, we submit that the validity of the Act of March 26, 1868, is *res judicata*, and that the question of the continued existence in full force of the relator's charter, as contained in the Act of March 2, 1857, amended by the Act of March 26, 1868, is no longer open to controversy between the parties to this suit.

It is not necessary that I should occupy your Honors'

time in dwelling on the doctrine of *res judicata*. In my printed brief, on page 88, is cited a very clear and terse statement of that doctrine by the Supreme Court of Missouri in the case of *Chouteau vs. Gibson*, reported in 76 Missouri. Your Honors have held the same doctrine in repeated decisions, some of them very recent, as in *Forsyth vs. Hammond*, 166 United States, page 518, and in *New Orleans vs. Citizens' Bank*, 167 United States, 396, and in *Southern Pacific Railway vs. United States*, decided in November last, reported in 18th Supreme Court Reporter, on page 27 and following.

Relator's Charter Powers.

Assuming the validity and unlimited duration of the relator's charter, the next question is as to the nature and extent of its corporate powers under that charter. That depends, of course, upon the construction or interpretation proper to be given to the Acts which constitute that charter.

I need not remind your Honors of the general rule of construction, applicable to all statutes, which was laid down by Chief Justice Marshall in the great case of *Gibbons vs. Ogden*, and again by Mr. Justice Story in *Martin vs. Hunter's Lessee*, that the words used are to be taken in their natural and obvious sense and not in a sense unreasonably restricted or enlarged.

Nor is it needful to dwell upon the general rule, repeatedly announced and applied by this Court in construing the charters of private corporations, especially business corporations, for the purpose of determining the nature and extent of their corporate powers. Your Honors have repeatedly held, in substance, that such corporations, so long as they are in good faith carrying out the objects for which they were incorporated, may not only exercise all powers specifically granted to them, but may exercise all powers and enter into any contracts incidental to those objects, reasonably construed, and necessary or proper for their at-

tainment. Thus in the case of *Fort Worth City Company vs. Smith Bridge Company*, 151 United States, 301, it was held that a company incorporated for the purpose of acquiring, laying out in lots, and selling a tract of land, and not for the purpose of building bridges, nevertheless had power to contract for the building a bridge over a stream separating its lands from an adjacent city, as a means of making its lands more accessible and salable. So in *Jacksonville Railway vs. Hooper*, 160 United States, 525, it was held that a railway company might contract for the erection and maintenance of a hotel at its terminus with a view to attracting tourists and increasing the business of its road. The same doctrine was applied by your Honors in *Green Bay, &c., R. R. Co. vs. Union Steamboat Co.*, 107 United States, 98, and in *Thomas vs. R. R. Co.*, 101 United States, 71.

The same doctrine has been repeatedly announced by the Supreme Court of Missouri in decisions several of which are referred to in my brief. In *Henning vs. United States Insurance Co.*, 47 Missouri, 432, that court said:

"Corporations, where they are not restrained in any particular manner by their charter, may adopt all reasonable modes in the execution of their business which a natural person may adopt in the exercise of similar powers."

In *Kitchen vs. Cape Girardeau, &c., R. R. Co.*, 59 Missouri, 517, it held that—

"In the absence of charter restrictions, the power of a corporation to make contracts is usually measured by the general objects and purposes of the incorporation. It is always presumed that a corporate body may make any proper contract whose scope and tendency are manifestly to forward the design of its legislative creation."

These are the general rules of construction by which is to be tested the relator's right to exercise the corporate powers and privileges which it claims, but which the respondents here deny that it possesses.

What is the general object for which this company was incorporated? There can be no doubt or dispute about that. It was incorporated for the manufacture and sale of artificial light; for the purpose of lighting the city of St. Louis—that is to say, of illuminating the streets, public places, and municipal buildings of that city; and also—which is a different thing—for the purpose of supplying artificial light, and the means of producing it, to private consumers in that city. There is no necessary connection between the two; but it is expressly authorized to exercise both these powers or privileges. By the original Act of incorporation express authority was given to this company and to the city of St. Louis, if such authority were needed, to enter into all contracts for the lighting of the city which they might choose to make. That particular section was repealed by the Act of 1868; but, as the Supreme Court held in the case in 86 Missouri, 499, cited on page 89 of my brief, the power still remained, under section 5 of the charter to exercise all necessary powers for carrying out the objects of the corporation.

Of course, the relator does not claim that the city is under any obligation to contract with it for city lighting, whether by gas or electricity, and expressly disclaims in its petition any exclusive right under its charter. Relator, as the petition states, is now lighting part of the city by electricity under a contract with the city; but if there were no such contract, or it should expire and no other be made with the city, the denial of relator's charter rights here complained of would still affect relator's business with private consumers.

If, then, this is a company incorporated for the production and sale of artificial light, and has whatever powers may reasonably be exercised for the purpose of attaining those objects, it is manifest that it has, on general principles, the right and corporate power, unless there be some restriction in the charter, to manufacture artificial light in whatever practicable and otherwise lawful method in which that

purpose may be carried out. That is the only reasonable construction of the charter, according to the rules already referred to.

But I should like to call more particular attention to the grants of power in the charter. First, the company is expressly empowered to carry on the business of lighting the city of St. Louis; secondly, to carry on the business—which is a distinct thing—of making and vending gas, gaslights, and gas fixtures, and any substance or material that may be now or hereafter used as a substitute therefor—that is, as a substitute for gas, or for gaslight, or for gas fixtures. Its express corporate powers include the making and vending those three things, gas, gaslights, and gas fixtures, and also the making and vending of any substitute which then was or might thereafter be used for any of those three things; and *to that end* the further express power is granted to the company to lay down anywhere within the corporate limits of the city of St. Louis all pipes and fixtures *or other thing properly required* for the exercise of the powers so granted: *Provided*, that this must be done with as much dispatch and as little inconvenience to the public as possible. Of course, if your Honors please, we recognize that condition to the fullest extent. I shall have something more to say on that point later. But, subject to that sole condition, here is an express grant from the State of the power to make artificial light and to furnish such light for the illumination of the city of St. Louis, its streets and public buildings, and also to make and furnish artificial light for the purpose of illuminating private buildings and supplying private consumers; and for that purpose the company is expressly empowered to make and vend not only gas, gaslight, and gas fixtures, but also any substance or material then or thereafter used as a substitute for gas, or for gaslight, or for gas fixtures.

I submit that it would be impossible to frame a grant of power to make, supply, and sell artificial light in broader

terms than these. The purpose expressed and the power granted was to make artificial light, not only as it was then commonly made, by using gas, but to make it in any other way, and by using any other substance or material which then was or might thereafter be used as a substitute for gas. What broader terms could have been used? The company was told, in effect, "Your business is to furnish artificial light; you may make and furnish it by means of illuminating gas or by the use of any substitute therefor that you may find practicable." That is the general proposition on which we ask your Honors to base the construction of this charter, so far as the corporate objects and powers of this company are concerned.

The next express grant of power related to a very important practical matter—the conveyance or transmission of the illuminant, the means or material for producing light to the innumerable distant points throughout the city where it would be needed, both for public and private use. That is another distinct right or privilege granted in these words, as amended in 1868:

"And *to that end* may establish and lay down, within any portion of said corporate limits as now or hereafter established, *all pipes, fixtures, or other thing properly required in order to do the same* (the same to be done with as much dispatch and as little inconvenience to the public as possible)—"

And that is followed by another and very general grant:

—"and shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company."

In *St. Louis Gaslight Co. vs. St. Louis*, 86 Missouri, 499, just now referred to, the Supreme Court of Missouri held that this was a distinct and substantive grant of power under which, notwithstanding section 6 of the Act of March 2, 1857, was repealed by the Act of 1868, the relator had

power to enter into the contract known as the "Tripartite Agreement."

Electricity.

But at this point is interposed the objection of the respondents that though the relator may have corporate power to lay pipes for gas, it has no right to lay pipes for electric wires, because, they say, it has no right *to make or vend electricity;* inasmuch as its corporate rights and franchises are confined to making and vending gas, gaslights, gas fixtures, and any substance or material used as a substitute therefor, and electricity, it is said, is not a substance or material.

In other words, unless the relator is able to answer the question, "*What is electricity?*" and to show that it is a substance or material, it has not corporate power to make or vend *electric light.*

I take issue with that proposition. I deny that either the nature or the extent of the relator's corporate powers under this charter depends upon its ability to solve a scientific conundrum. For the purpose of construing this charter or determining what rights and powers it confers, the question, "*What is electricity?*" is absolutely irrelevant. The true question is, and it is a practical question, a simple question of fact—

"*Is electric light a practicable substitute for gaslight?*"

If it is, then the relator has the corporate right and privilege of making and vending electric light. So far as relator's corporate powers are concerned or the true construction of its charter, it does not make the slightest difference what *electricity* is—whether it is or is not a substance, or a material, or a mode of motion, or a mysterious energy, or any other inscrutable entity. A very simple illustration, I think, will make that clear.

Suppose that the relator, in virtue of its admitted corporate power of lighting the public streets of St. Louis with gas, should offer to obligate itself by contract with the city

during a certain period, for a specified annual sum, to erect and maintain a specified and sufficient number of gas lamps on the several streets, to keep them in proper condition, to supply the necessary quantity of gas, *and also to light the lamps every evening, and see that they were kept burning during so many hours of each night?*

Would there be anything *ultra vires* in such a contract by the relator under this charter? Such contracts are constantly made by such companies with the authorities of cities and towns, and are supposed to be clearly within the corporate powers as well as for the benefit of both parties.

But then suppose that some uncommonly astute person, some *leguleius cautus et acutus*, should object that though its charter authorizes relator to make and vend gas and gas-lights and to light the city, it nowhere authorizes the company to make or vend *heat*, or to make use of that mysterious agent or form of energy or mode of motion in order to bring the gas into a state of combustion or incandescence. He might admit, he would have to admit, that except by the application of heat the gas could not be made to fulfill the purpose for which the company was empowered to make and vend it. But he might still insist that this company has no charter right or privilege of making or vending heat; and that unless it can answer the question, "*What is heat?*" and show that heat is a substance or material used as a substitute for gas, the company has no charter power to employ it in any way, for any purpose.

I imagine that my friend, the city counsellor, would smile at such an objection, as he well might. But if that contention would not be tenable in reference to *gaslight*, why should a precisely similar contention as to *electric light* be any more so?

I called your Honors' attention yesterday to the averments in the relator's reply in reference to the production of artificial light by the application of what is called *electricity*, whatever that may be, to pure carbon in the form

of rods or filaments, instead of producing light by applying *heat*, whatever that may be, to carbon in its compound form of illuminating gas. That these averments are true stands admitted on the record. If they were not so admitted, this court would take judicial notice of them, as it took notice in *Brown vs. Piper*, 91 United States, 37, cited on page 106 of the brief for relator, of physical facts in reference to the effects of cold and freezing mixtures, much less generally known. I need not repeat those averments in detail. They establish the physical fact that artificial light is and must be produced by bringing some suitable substance or material to a state of incandescence or white heat; that gaslight is produced by applying heat to illuminating gas, a compound of carbon, thereby decomposing it and setting the carbon free in fine particles which become incandescent, while electric light, which is an approved substitute for gaslight and a better illuminant, is produced by applying what is called electricity to pure carbon in the form of prepared rods or filaments, which are thereby made incandescent. In both cases carbon is the substance or material used. The object is to bring it to a state of incandescence, thereby producing artificial light, the production of which is the object for which this company was incorporated. Its charter contains no restrictions as to the methods by which or the conditions under which that object may be attained, whether by applying heat, whatever that may be, to carbon in the form of gas, or by applying electricity, whatever that may be, to carbon in a different form. The company, under the rules I have cited and under the general grant of "all necessary powers," has equal right to use either heat or electricity or any other agent, energy, force, or mode of motion for the purpose of producing artificial light by bringing to a state of incandescence either carbon or platinum or any other substance or material suitable for that purpose. As I have said, it is upon that broad and practical view of its corporate objects and corporate powers that I rest the argument for the relator

on this branch of the case. In that view of the controversy, I repeat that it is absolutely immaterial whether electricity is or is not a substance or material, or what it is or what it is not.

If time permitted, I might be tempted to consider some of the grounds upon which my friend maintains that electricity is neither a substance nor a material. For example, on page 144 of his brief it is said: "A substance or material is tangible; electricity is not." As to the word "substance," I take leave to question this statement from the point of view not only of accurate definition, but of etymology, of theology, and of metaphysics. On the question of definitions the lexicographers are entitled to speak. I find in Webster's Unabridged Dictionary six definitions of the word "substance," of which only two apply to things tangible. The Century Dictionary, the latest and best authority, gives it ten different meanings, of which only two include anything tangible, being the same two that Webster gives. Of the rest at least one is removed to an infinite distance from any material conception. It defines the word as used by theologians—"the divine being or essence"—and its authority for this is found in that most ancient and venerable of all professions of Christian faith—the Nicene creed—in those words which represent the second person of the Trinity as "of one *substance* with the Father." I need not remind your Honors of the circumstances which attended that solemn declaration, transmitted to us through all the vicissitudes of sixteen centuries; of that great assemblage of the bishops and fathers of the church from Africa, from Asia, from farthest western Europe, convened and presided over in person by the Roman emperor, the first Christian emperor, Constantine the Great, victorious over all enemies in the field and eager with the ardor of a new convert to achieve new conquests in the world of faith; of the picturesque and historic figures of Arius, defeated, proscribed, and exiled as a heretic, and of his great adversary, Athanasius, just entering upon

that long and stormy career in which he so often stood alone, *Athanasius contra mundum*, Athanasius against the world. Your Honors will remember how great a part was played in that fierce controversy by the Greek word *hypostasis*, the exact etymological equivalent of the Latin word *substantia*, which we turn into English as *substance*, and which literally means that which stands under or among—the primary definition of it being "that which exists by itself, and in which accidents inhere." In that metaphysical sense it is defined by John Locke, in his Essay on the Human Understanding, as signifying "something whereof we have no particular distinct, positive idea, but which we take to be the substratum or support of those ideas we do know." And again: "So that of *substance* we have no idea *what it is*, but only a confused, obscure one of *what it does*." But if that be the definition of *substance*, then electricity is a substance, for our knowledge concerning it cannot be better described than by confessing that we do not know what it is and have not a very clear idea of what it does. And is not that just as true of heat? But this we do know, that by means of heat, and also by means of electricity, whatever either of them may be, carbon, which is a material, can be made incandescent and artificial light produced. And the production of artificial light from carbon, or from any other material, is within the corporate objects, and therefore within the corporate powers, of this relator.

Other Charter Powers.

Assuming, then, if your Honors please, not only that the charter is valid, and that the company is not a ghost, but that it is entitled to enjoy the charter rights and privileges it claims, we come to the violation, as we claim, of our charter rights by the enforcement of this ordinance.

Your Honors will remember that I read yesterday from the opinion of the Supreme Court of Missouri, rendered at

an interlocutory stage of this case, not upon the final demurrer and not discussing the new matter set up in our reply, the conclusion of the court, as follows:

"*As the case is now presented*, we must hold that the city, under its power to regulate the use of streets and under its general police power, has the right to require a compliance with regulations *which either wholly prohibit relator from laying its wires under the streets* or which regulate the manner in which it may be done."

Mr. Chief Justice FULLER: Is that word "either" or "neither?" In what volume of the Missouri Reports is the case reported?

Mr. HITCHCOCK: As it is printed in my brief, it is "either." I will look at the record and see which it is.

Mr. Chief Justice FULLER: Mr. Marshall, how is it in the volume of reports? Can you give a reference to the volume?

Mr. MARSHALL: I have not the volume of the reports, sir.

Mr. Chief Justice FULLER: Was not the opinion published?

Mr. MARSHALL: Yes, sir.

Mr. Chief Justice FULLER: In what volume of the Missouri reports is that opinion printed?

Mr. HITCHCOCK: I have forgotten the volume, sir. I have not referred to it.

[After referring to the printed record, Mr. HITCHCOCK stated that the word in question appeared there as "neither," but that this was evidently a mistake for "either."

Mr. Marshall presently produced volume 130 of the Missouri reports and informed the Court that, according to the official report of the opinion in this cause as therein published, the word in question (on page 27 of said volume) is not "neither," but "either."]

Mr. HITCHCOCK continued:

Our contention is, then, may it please the Court, that the judgment of the Supreme Court of Missouri denying the writ of *mandamus* applied for, and the consequent enforcement of the city ordinance set out in the relator's reply, and which was in fact the sole ground upon which permission was refused by the city of St. Louis to this relator to lay its pipes in the streets, impairs the obligation of our contract with the State. We insist that the relator possesses charter rights and powers essential to its corporate purposes which cannot be carried out, cannot be exercised, if that ordinance be enforced.

And, first, I call your Honors' attention to the fact that by the provisions of *that ordinance alone* has the city of St. Louis attempted, as against this company, to assert the powers it here relies on. That ordinance alone was pleaded by the city, independently of certain objections to the charter to which the court below paid no attention, assuming expressly that they had no force. That court passed only upon the question, whether or not the city had the right to forbid the laying of these pipes, the relator having failed to comply *with that ordinance*, and held that it had. In other words, assuming the relator's charter to be valid and to confer the powers it claims, I respectfully submit that the question presented by this record is,—Whether the ordinance here complained of—not some part of it, or some possible modification of it, which might perhaps be reached if this were a suit in equity, but the whole ordinance as it stands, with all its conditions and requirements—can be enforced against the relator without violating its constitutional rights? It is very important, I respectfully submit, that this be recognized as the real controversy here.

Of course, we do not question the powers of the city within their constitutional limits, and when exercised with due regard to our charter rights; but we respectfully insist that the enforcement of this ordinance is a denial of relator's

rights under its charter, which are essential to the objects and purposes of its corporate existence. And if, as relator claims, that charter is an existing and valid contract by the State of Missouri, then such denial is a violation of the relator's rights under the Constitution of the United States.

That ordinance was for the first time set out in full in the reply of the relator, having been pleaded only in part in the return of the respondents.

As I have pointed out, the corporate powers granted to the company include not only the general right of carrying on the business of making and selling artificial light, including the right or privilege of lighting the city of St. Louis, which, as the petition shows, is not an exclusive right, and must be execised, if at all, under some contract with the city, also including the right and privilege of supplying artificial light to private consumers, but also, *to that end*—that is, to the end that it may freely and successfully exercise those privileges—the further right to establish and lay down in any part of the corporate limits of said city—I am now quoting the words of the grant—

"All pipes, fixtures, or other thing properly required in order to do the same, the same to be done with as much dispatch and as little inconvenience to the public as possible."

The right of the relator under that grant to lay and use *gas pipes* under the streets is not denied. On the contrary, the respondents' return avers that the company had been in the habit of laying underground gas pipes. The question is upon the relator's right to lay pipes under the streets in which to place suitable wires for the transmission of electricity for the production of electric light as part of its business as a lighting company.

I call attention, also, referring to the words "or other thing properly required in order to do the same," to the fact that the respondents' return avers that in order to convey electricity it is necessary to carry the same by means of

wires strung on poles overhead, "or by means of wires strung in non-conductive tubes or conduits beneath the surface of the streets." Respondents thus admit that the pipes the relator wish to lay are something "properly required" for the purposes named in its charter. Moreover, the court below in its opinion deemed it proper to state the fact as of public notoriety, that the question is now under consideration, whether the public safety as well as convenience does not require these wires to be placed under ground.

If, then, relator has the right to furnish electric light, and has the right to lay pipes, it has the right under this grant to lay pipes under ground, because they are something "properly required," and it is to that end that that corporate power was given. In other words, when the State granted to the relator those corporate powers, that grant unquestionably included the right to lay down under the city streets, in suitable conduits, wires suitable for the production of electric light.

I also call your Honors' attention to the fact that in the relator's reply it not only set forth in detail the methods of producing electric light, but also averred in detail the mode in which it intended to lay those pipes, their dimensions, the space to be occupied, and the manner of their construction; and it was further expressly averred that they were the best practicable methods of conducting electric wires for lighting.

Your Honors will at once perceive the importance of these allegations with reference to the question of the police power, upon which in part the conclusions of the court below were based. They were necessary allegations, not only from that point of view, but also in view of the condition in the grant to relator, that the right expressly conferred upon it, "to that end," namely, to the end that its lighting business might be successfully carried on—the right to establish and lay down all pipes, fixtures, or other thing properly required in order to do the same—shall nevertheless be ex-

ercised with as much dispatch and as little inconvenience to the public as possible.

Now, this record leaves no doubt, if your Honors please, on that point. It eliminates that question from the case. In the first place, the petition expressly averred that the work it desired and intended to do would be done in the best and safest manner; that its purpose in substituting under-ground wires for the overhead wires it was already using, with the city's consent, for furnishing electric light not only to private consumers, but to the city itself, under a contract with the city for lighting the streets by electricity, which has some years yet to run, was to avoid the increasing inconvenience and danger to the public necessarily incident to the use of overhead wires; that in order to provide more effective and proper service, it, relator, had made arrangements to lay its wires under ground along and under the city streets in the most approved and practical manner, and that it was ready to do so with as much dispatch and as little inconvenience to the public as possible.

This challenge was not accepted by the respondents. Not one of these allegations was put in issue either by way of specific or of general denial, though divers other allegations were denied. They therefore stand admitted of record.

But the relator's reply, as I have pointed out, goes still further into details as to the method of constructing the proposed pipes or conduits, and expressly avers that they are of the most approved description, such as are used for like purposes elsewhere; that when completed and in use they will offer no obstruction whatever to travel and traffic, and that by their use the danger to life and property attending the overhead wires now used by relator under contract with the city will be entirely avoided. All these allegations are admitted by the demurrer to the reply first filed by the respondent Murphy and afterwards adopted as its own by the city of St. Louis.

But if, as we contend, relator has the right and privilege under its charter to make and vend electric light, and to that end to lay suitable wires under ground in conduits or pipes, that right is a corporate franchise, and the grant of that right contained in its charter is a contract by the State.

In the leading case of *New Orleans Gas Light Co. vs. Louisiana Light Co.*, 115 United States, 650, your Honors held that the right to lay gas pipes in the streets of a city was a franchise or privilege which can be granted only by the State or by the municipality acting under legislative authority; and further held that such a grant by the State is—

"none the less a contract because the manufacture and distribution of gas, when not subjected to proper supervision, may possibly work injury to the public, for the grant of exclusive privileges to the plaintiff does not restrict the power of the State or of the municipal government of New Orleans, acting under authority for that purpose, to establish and enforce *regulations which are not inconsistent with the essential rights granted by plaintiff's charter*, which may be *necessary for the protection of the public against injury*," etc.

That ruling touches the vital point of this case. It recognizes the duty of the city and the State to protect the public against actual injury, but it requires also that rights granted by the State and guaranteed by the Constitution shall not be denied under color of the police power.

Other decisions of this Court maintain the same doctrine. In *New Orleans Water Works Co. vs. Louisiana Sugar Refining Co.*, 125 United States, 18, your Honors held that a city ordinance regulating corporate franchises, if adopted in pursuance of authority granted by the State, is the act of the State, and if in excess of its power to regulate or modify such franchise, is void.

In the brief for relator, on pages 110 and following, this subject is discussed more fully than time now permits, and I beg leave to refer your Honors to the cases there cited from the Missouri reports, in which the limits of the police

power in respect of corporate franchises and vested rights are strongly stated, in entire harmony with the decisions of this Court.

I would also refer in this connection to the important case of *Pearsall vs. Great Northern Railway Co.*, 161 United States, 646 and following, decided by this Court since the former argument of this cause. In that case your Honors very fully considered the nature of corporate franchises and the extent to which and the circumstances under which they are vested rights protected by the Constitution.

After referring to the Dartmouth College case and reviewing many later decisions, the opinion says, on page 661 :

"Subsequent cases have settled the law that wherever property rights have been acquired by virtue of a corporate charter, such rights, *so far as they are necessary to the full and complete enjoyment of the main object of the grant, are contracts* and beyond the reach of destructive legislation."

Again, on page 662, citing with approval the case of State Bank of Ohio *vs.* Knoop, 16 Ohio, 369, it is said :

"In this connection it was said by Mr. Justice McLean : 'Every valuable privilege given by the charter, and which conduced to an acceptance of it and an organization under it, is a contract, which cannot be changed by the legislature where the power to do so is not reserved in the charter.'"

On page 663 it is held that the principle includes grants of an exclusive right to supply gas or water to a municipality, or to occupy its streets for railway purposes ; citing the *New Orleans Gas case*, 115 United States, 650, and other decisions of this Court ; and later, on page 673, after defining what constitutes a vested right according to familiar and settled rules, it is said :

"As applied to railroad corporations, it may reasonably be contended that the term extends to all rights of property acquired by executed contracts, *as well as to all such rights as are necessary to the full and complete enjoyment of the original grant or of property legally acquired subsequent to such grant.*"

That the relator's right, under its charter, to lay underground conduits for its electric light wires falls within these principles surely is too clear to require argument.

On the other hand, in that same case and in connection with these clear and strong statements as to the nature and the sanctity of such rights, your Honors pointed out that the protection of such rights which is guaranteed by the Constitution is entirely consistent with legitimate control by the legislature, because, as is said on page 665—

"Statutes which operate only to regulate the manner in which the franchises are to be exercised, *and which do not interfere substantially with the main object of the grant*, are not open to the objection of impairing the contract."

I would also recall to your Honors in this connection the case of *Louisville & Nashville Railroad vs. Kentucky*, decided about the same time with the *Pearsall case*, and reported in 161 United States, 700, in which the same principles were applied.

In the case at bar no question can arise as to any power having been reserved by the State to modify or repeal the relator's franchises. As I have fully shown, this charter is, and has been held by the Supreme Court of Missouri to be, not subject to legislative repeal or alteration.

But I would call your Honors' attention to another and important feature of the cases just cited, the *Pearsall case* and the *Louisville and Nashville Railroad case*, to which I may add the *New Orleans Gas case*, 115 United States; the case of *New York and New Haven Railroad vs. Bristol*, 151 United States, and the recent case of *Baltimore vs. Baltimore Trust Co.*, 166 United States, 684, namely, the requirement that no exercise or alleged exercise of the police power by way of regulating corporate franchises such as I have mentioned can be sustained *unless that power is exercised in good faith.*

In the *Baltimore Trust Co. case*, in 166 United States, the regu-

lation complained of affected the franchise of a street railroad company, and the city claimed the right to enforce it under the power to regulate the use of streets—a claim also made in this case by the city. Your Honors, upon the facts of that case, upheld that regulation; but the general rule was thus stated on page 684:

"This power of regulation of the use of streets is a continuing power; it is not exhausted by being once exercised, *and so long as the object is plainly one of regulation*, the power may be exercised as often as and whenever the common council may think proper; the use of the street may be subjected to one condition today and an additional one tomorrow, *provided the power is exercised in good faith and the condition imposed is appropriate as a reasonable regulation, and is not imposed arbitrarily or capriciously.*"

So in *Louisville & Nashville Railroad vs. Kentucky*, 161 United States, 700, after citing some cases in which State laws were held void as impairing the obligation of contracts, the opinion proceeds:

"These cases, however, do not infringe upon the general rule so frequently declared, that *where the police power is invoked in good faith* for the prohibition of a practice which the legislature has declared to be detrimental to the public interests, it will be sustained *wherever it can be done without the impairment of vested rights.*"

These decisions, I submit, are very pertinent to a case in which, as I have pointed out to your Honors, the record not only does not show, but absolutely negatives, any interference by the relator with the public convenience or safety by the construction or use, in the business authorized by its charter, of its proposed conduits; or that they would occupy an unreasonable space in the public streets, or exclude others from a like use of the streets, so far as the nature of the case permits, if the city authorities should authorize such additional use; or would have any effect or cause any inconvenience whatever, to prevent which either the power to

regulate the use of streets or the police power could be legitimately and in good faith invoked.

Again and again, in these cases which I have cited and in others, now holding one State law void and now holding another State law valid, this doctrine has been steadily applied with the firm and even hand which has distinguished the decisions of this great tribunal from its foundation. The police power, your Honors have many times said, may always be invoked for the safety and protection of the people against wrong; but it must never be invoked or exerted arbitrarily or in disregard of rights guaranteed by the Constitution.

Objections to the Ordinance.

With your Honors' permission I will now briefly consider the actual provisions of this ordinance, but would also respectfully refer to the careful analysis of it on page 112 and following of my brief.

It is an ordinance declaring the conditions upon which, and upon which only, any person, corporation, or association can obtain the right and permission to place electric wires or cables along, across, or under any street in St. Louis. One important feature of it is that those conditions are so strictly connected with and dependent upon each other that without fulfilling each and every one of them in the order prescribed such permission cannot be obtained by any one.

Now, the very first of these conditions is that the corporation desiring such permission shall have been *duly authorized by the Municipal Assembly to do business in the city of St. Louis.* All the subsequent conditions are based upon and expressly require this condition precedent to be fulfilled.

I trust that your Honors clearly apprehend the relation of the Street Commissioner to this matter. His duties in reference to street excavation might, perhaps, be likened to the duty of a sentinel or of a doorkeeper. He is the city official having the sole immediate charge

and supervision of the streets. Under the ordinance (section 568 of the Revised Ordinance) set out in the petition, no person can lawfully make any excavation in any street without written permission from the Street Commissioner, excepting public work done under the authority of the Water or Sewer Commissioner, and even they must notify the Street Commissioner of any excavation ordered by them.

Relator, deeming its charter sufficient authority, and having, as the record shows, first notified the Street Commissioner of its purpose, sent some workmen to begin the necessary excavation. He had them arrested by the police and notified relator that no excavation could be made without a permit from him. Relator then applied to him for a permit to excavate, so that it might lay its wires as authorized by its charter. He refused to give relator a permit to excavate any street for any purpose, and threatened to arrest any one who should attempt any excavation for relator. He refused it because relator had not complied with the ordinance here complained of, and on that the issue was joined.

Mr. Chief Justice FULLER: Had you made application to the Board of Public Improvements?

Mr. HITCHCOCK: No, sir; I am referring to the Street Commissioner. The Board of Public Improvements, under sections 605 and 606 of that ordinance, is authorized to approve plans submitted by any person or corporation *duly authorized by ordinance to do business in the city of St. Louis*, and desiring to place its wires in the streets. But a preliminary step, without which the Board of Public Improvements has not even the right to look at plans, is that the Municipal Assembly must first by ordinance authorize such person or company. That is the first step, and unless that authority has been given by the Municipal Assembly, the Board of Public Improvements has no right to look at, and will not look at, any plans submitted by any corporation.

That is our first grievance. That is the denial at the very root of our charter rights.

The conditions prescribed by the ordinance here in question are these. They are carefully analyzed and stated on pages 112 to 115 of my brief. The party desiring to exercise that right must first obtain authority from the Municipal Assembly of St. Louis to carry on the business; then it must have its plans approved by and obtain a permit from the Board of Public Improvements; then it must file with the city register an acceptance of all the terms of that ordinance, which, in our case, would have acknowledged the unqualified right of the city to prescribe all the conditions upon which we might carry on the business of furnishing electric light; then it must give bond in the sum of $20,000, to be filed with the city register and approved by the mayor and council, one of the conditions of which is to file sworn statements semi-annually and pay to the city treasurer 5 per cent. of its gross receipts, and must also agree to comply with all ordinances thereafter to be passed in relation to the subject.

Now, we say that these requirements strike at the very root of our charter power. If we have to go before the Municipal Assembly and get their consent as a condition precedent to exercising that right, they may refuse their consent; and if they refuse their consent, what is our charter right worth? We found out what it was worth on that theory. We had no alternative but to apply to the courts. The very first condition of that ordinance was a denial of our right to carry on the business of electric lighting unless the city authorities saw fit to approve the permission given to the relator by the State of Missouri. The city must approve our charter rights or they are annulled.

But, in addition to this general and fundamental objection, we submit certain specific objections, which I will mention, asking leave to refer your Honors for a fuller statement

of them and the authorities cited to pages 117 and following of my brief.

The first of these objections is that the power to regulate the use of streets conferred by the city charter is a power which the charter expressly says must be exercised *by ordinance*. Your Honors will find in a clause of section 2 of the article set out in the respondents' return that the Mayor and Municipal Assembly shall have power by *ordinance* to do a good many things—among others, to regulate the use of streets. I have quoted in my brief a list of cases decided by the Supreme Court of Missouri, in all of which it was held that this power cannot be delegated, but must be exercised by ordinance. The doctrine is a familiar one, and I will not now detain your Honors with citations, but beg to refer to my brief for the cases we rely on.

We object to this ordinance, therefore, on the special ground, set up in relator's reply, that it does not exercise the power to regulate the use of streets, but attempts to delegate that power to the Board of Public Improvements. In other words, it is an attempt to delegate power which cannot be delegated; and since the action of that Board is an essential step in the proceedings prescribed by the ordinance, the ordinance is void for that reason.

The next specific objection we make is one I have already foreshadowed. It is claimed that this is a power to regulate the city streets. It is not an exercise of the power to regulate; it is an exercise of the power to prohibit. As I have already shown, this ordinance forbids the relator to exercise essential rights under its charter, unless the city consents to it. But that is a power of prohibition, not of regulation.

At this point, if your Honors please, I may as well say, although I must speak briefly, that the relator fully recognizes and desires to meet its own obligations to the State, the city, and the public, including the limitation upon its powers contained in the charter itself. It has the right

under its charter to carry on the lighting business, and to that end to establish and lay down all pipes, fixtures, or other thing properly required therefor, but with the condition that the same be done with as much dispatch and as little inconvenience as possible to the public. We fully recognize that obligation; but, as I have already shown, there is nothing in this record which tends to show, nor has it been or can it be claimed in this case, that that condition has been or was or is likely to be violated; and, if not, then on what ground, by what right, can the relator be lawfully forbidden by the city, or by the State, or by anybody, to exercise the essential rights held under its charter?

But it may be asked, "Do you claim that this company is a chartered libertine which has the right to go into the streets of St. Louis and tear them up at pleasure?" Certainly not. No such right is asserted. No such privilege is sought in this proceeding. The writ of *mandamus* prayed for conforms strictly to the conditions of the relator's charter and to the official powers and duties of the Street Commissioner, who is the only city officer authorized to issue such permits. All the relator asks is that the rights granted to it by the State shall not be annulled and destroyed by the city, by imposing conditions which the State did not see fit to impose. The condition imposed by the State is that relator shall exercise these rights with due regard to the convenience and safety of the public. No disregard of these is even alleged. If it should disregard them, it would, of course, be acting *ultra vires* and be subject to lawful control and restraint within the proper limits of its charter rights; but that this company should be restrained or prevented from exercising its charter rights at all, except at the mere will and consent of the Municipal Assembly of St. Louis—that is a totally different thing.

That distinction was recognized by his Honor Mr. Justice BREWER in his opinion in *St. Louis vs. Western Union Telegraph Co.*, on the rehearing, in the 149th United States.

There the question was raised as to the city's control of the streets. It was contended that the Western Union Telegraph Company had certain rights independently of the city; but his Honor held that it had not.

I read from his opinion on page 470:

"Unless, therefore, the telegraph company has some superior right which excludes it from subjection to this control on the part of the city over the streets, it would seem that the power to require payment of some reasonable sum for the exclusive use of a portion of the streets was within the grant of the power to regulate the use. That the company gets no such right from the General Government is shown by the opinion heretofore delivered, nor has it any such from the State."

His Honor then refers, on page 471, to the case of *Atlantic & Pacific Railroad vs. St. Louis*, 66 Mo., 228, cited by counsel, but holds that it is not pertinent to the claim of the Western Union Telegraph Company, which is not a Missouri corporation and has "no general or irrevocable power to occupy the streets in any city in the State through all time."

But every condition which his Honor found wanting in respect of the telegraph company in that case plainly exists in behalf of this relator. It is a Missouri corporation, having an irrevocable charter, which does give it a superior right to occupy, for the purposes and under the conditions limited in that charter, the streets of St. Louis; and the ruling in the *Atlantic & Pacific* case in 66th Missouri is not only pertinent, but conclusive, that its rights under that charter are not subject to be annulled by a city ordinance or at the will of the Municipal Assembly of St. Louis.

What these rights are I have endeavored, perhaps at too great length, to state to your Honors as we honestly conceive them. In behalf of my clients, I have emphatically disclaimed any purpose or desire to disregard the conditions annexed to the grant from the State, upon the faith of which

it has expended and its shareholders have invested great sums of money. I have as emphatically acknowledged the right and duty of the municipal authorities, in the event that it should disregard them, to take proper and lawful steps to restrain it from so doing.

Exactly in what manner that restraint might or should be exercised, if the occasion arose, of course it is not my province to discuss. I am not here to frame hypothetical ordinances or discuss hypothetical cases. I am here simply to point out, as I have endeavored to do, that the only method by which, so far as we are concerned, the city of St. Louis has yet undertaken to assert such control as may properly belong to it, is a method of destruction—a method which cuts our rights up by the roots. That is what we complain of. Whenever it shall appear that this company is overstepping its charter rights, has gone beyond its powers, then the city should be able to find some lawful way of restraining it, consistently with its vested rights and with your Honors' rulings in the cases I have referred to—the *Pearsall* case, and *Mugler vs. Kansas*, and *New Orleans Gas Light Co. vs. Louisiana Gas Light Co.*, and all that series of opinions referred to in my brief and perfectly familiar to your Honors, in which it has been consistently held that the police power must be exercised for its true ends, in good faith, with unfailing regard to the essential rights protected by the Constitution of the United States.

Another specific ground upon which we claim that the ordinance is oppressive, unreasonable, and void, is because another and essential condition of the ordinance is that the relator shall give bond to comply for all future time with whatever commands or demands the city of St. Louis may by ordinance prescribe. The city cannot lawfully require this company to enter into bond to give away its charter rights whenever they choose to demand it. I need not dwell on that proposition, for the principles on which it is based have been already stated.

Nor can the city lawfully impose upon the relator, as a condition of exercising its charter rights, the tax of 5 per cent. annually on its gross receipts, which this ordinance exacts. The power to tax is the power to destroy. If 5 five per cent., why not 75 per cent. or 100 per cent.? This condition of the ordinance is unlawful and void, as annexing to the enjoyment of relator's franchises a burdensome condition not imposed by the State, thereby impairing the obligation of the contract; nor can it be upheld as a reasonable regulation of the use of streets, for reasons stated in respect of a similar tax upon a street railroad company in *Mayor, &c., vs. Second Avenue Railroad Co.*, 32 New York, 261, cited in my brief; nor as a police regulation, on the grounds I have stated in reference to the limits of the police power.

One other matter I refer to, only in order to give my friend, Mr. Marshall, an opportunity to meet my criticism of a case upon which he seems to rely. Your Honors will find that the propositions discussed in my friend's printed brief on file are based upon the original demurrer of the relator to the return of the respondent, and are not based upon the joint demurrer to the relator's reply, ultimately filed by the street commissioner and adopted by the city after the city became a party. Of course, I am not finding fault with this, but simply noting the fact. It is the same brief which was submitted to the court below when the relator's demurrer to that return was argued, which was the only argument heard in that court. As I said yesterday, the court below, when final judgment was rendered, simply said, We rely upon our former opinion; and that opinion was based entirely on the respondent's return.

In that brief I find that my friend refers to the case of *New York vs. Squires*, in 145 United States, 175, as a conclusive answer to all our objections to the ordinance. I did not discuss that case in my brief on file in this Court because I really did not think it was necessary to answer it, but it

may be well to state briefly why we think that case is absolutely irrelevant to this controversy.

The Electric Lines Company, relator in that case, was organized in 1882, under the New York general telegraph law of 1848, as amended in 1853, which was a general corporation law. This company did not have a special charter and did not claim any special rights by grant from the State. Among the conditions prescribed in the Act was that it should obtain the consent of the municipal authorities before constructing its line on or under any street, road, &c.

In the return made by the respondent in the case at bar a similar provision is cited from section 2721 of article V, chapter 42, Revised Statutes of Missouri, 1889, as applicable to this relator. To this it was answered, in the reply filed by relator, that that section, 2721, is found in article V of the Missouri General Corporation Law, which purports to and does relate exclusively to telegraph and telephone companies organized under that article, and that therefore that provision was irrelevant to this controversy.

But in the New York case there was such a provision, and it did apply to the relator company. That company accepted that provision and agreed, in order to obtain permission from the city of New York to lay wires underground, to comply with certain conditions contained in a city ordinance adopted in December, 1878, prescribing in detail the method of constructing the conduits. Those conditions included, among other things, the filing of a map and diagram, and its methods of construction were subject to the approval of the Commissioner of Public Works. In *May, 1883*, the company did file a map and diagram, but it took no further step until *July, 1886*. It then applied to the Commissioner of Public Works for a permit to excavate streets, claiming that it had the right, having complied with the provisions previously in force, to obtain that permit. The Commissioner refused, because in the meantime, after the map, &c., had been

filed, in May, 1883, and before the company applied for that permit, two other amending Acts had been passed, amending the general law, which of course the legislature had the right to do at any time, creating a new Board of Electrical Subways. The new Act provided that all plans and diagrams of that kind should be submitted to and approved by this new body, and not, as before, by the Commissioner of Public Works. The relator company had not, when it asked for a permit, asked or obtained the approval of the Board of Electrical Subways. The Commissioner of Public Works refused the permit on that ground. They went into court to procure a *mandamus* on the ground that they were not obliged to submit their plans to the Board of Electrical Subways created under the Act of 1885, because in 1883, when they accepted the terms and conditions then existing, they had filed a diagram. The courts in New York ruled against them, and this Court affirmed their judgment, for reasons thus stated on page 190 of 145th United States:

"The utmost that can be said against the Acts of 1885 and 1886 is that they transferred the supervision and control of the matters of excavation of the streets and the construction of underground electric systems from the Commissioner of Public Works to the Board of Subway Commissioners. That is the sum total of the change effected. Not a right of the electrical companies was violated and no contract was impaired. The expressly reserved power of the State or municipality to regulate the use of the streets and highways in such manner as not to injuriously affect the public interests was merely transferred from one public functionary to another. The power was not enlarged; only the agency by which the supervising power of the State was to be exercised was changed."

That is to say, in 1883 the company could go to the Commissioner of Public Works for his approval. In 1886 they were required to go to the Board of Electrical Subways for their approval of exactly the same thing. Their obtaining such approval was one of the express conditions on which

they were to obtain the permit, and that condition they had expressly agreed to abide by from the beginning.

I submit that there is no parallel between that case and this. That company was chartered under general law. We have a special charter with special rights. That company was organized under a general law which required it to obtain the city's consent, and it obtained that consent by accepting all the conditions of the city ordinance of 1878. We were not called upon to obtain the city's consent. On the contrary, we have permission granted directly and expressly by the State, without reference to the city and without requiring its consent, upon a condition which we aver we have fulfilled, which we are ready always to fulfill, and which it is not averred we have violated or even that we will ever violate. In that case there was no denial even of the rights they were entitled to. They were simply told in 1883, pursuant to the express conditions they had accepted, that they must get the approval of a certain officer, while in 1886 they were directed to get the approval of a different officer, but he was to approve the same plans and work, for exactly the same purpose. That was why your Honors affirmed that judgment. I am at a loss to see what pertinence that case has to the case at bar.

If your Honors please, these are, in substance, the grounds upon which we maintain that this ordinance ought not to be enforced.

CONCLUDING ARGUMENT OF MR. HITCHCOCK.

If your Honors please, I desire to say a few words in reply to Mr. Marshall.

In regard to his last proposition, about the Act of 1868, I do not care to repeat that discussion, but I am at a loss to understand what my learned friend means when he talks about putting both parties, the city of St. Louis and the relator company, back in the position they were. I under-

stand his position, so far as that option is concerned, to be this—and if I do him injustice he will correct me. He contends that the Act of 1868 was void. If so, of course section 6 of the Act of 1857 was never repealed. But Mr. Marshall claims that both parties have acted upon the idea that the Act of 1868 was valid, and that consequently the city did not exercise the option given to it, and it ought to have another chance—that is to say, the Act was void, yet nevertheless it had the effect of somehow or other depriving the city of its right or option, and so the city ought to be put back into the position of exercising an option which, on their own theory, expired twenty years ago. I am absolutely unable to follow the logic of that proposition.

Mr. Marshall cites the decision in *State vs. Morrow*, 26 Missouri, 131, to sustain his contention that the Act of 1868 did not repeal section 9 of the Act of 1857 by implication. That case is not in point. In that case the amending Act, which repealed one provision of the former Act, contained nothing repugnant to or inconsistent with any other provisions of the former Act; hence the court declined to infer that any other provision was repealed by implication. But the Act of March 26, 1868, besides expressly repealing section 6 of the Act of March 2, 1857, in one section, also by another section so amended section 5 of the Act of 1857 as to be absolutely repugnant to and irreconcilable with section 9 of that Act. To such conditions the ruling in *State vs. Morrow* is wholly inapplicable, while the doctrine of *State vs. Draper* and *State vs. Miller*, on which we rely, is directly in point. And if it were held that those two cases announce a different rule from *State vs. Morrow* concerning repeals by implication, then those two later cases must be held to overrule the former.

Let me briefly refer to another point which I omitted in my opening, but can state just as well now. A good deal has been said by my friend about electric lighting being unknown to art in 1857. If your Honors please, without de-

taining you to read it. I simply ask your attention to the historical summary on that point contained in my brief, on page 99. This shows that in 1846 electric light was successfully employed on the stage in Paris, France, at the production of a famous opera; that in 1848 it was used in England to light a large public hall, and in 1852 to light the Liverpool docks; that in 1855 a principal quay at Lyons, France, was illuminated by electricity with great splendor and success, followed by an electric illumination of a *chateau* in Paris, also highly successful, in the same year, and in October, 1856, a still more magnificent illumination by electricity was carried out from the summit of the Arc de Triomphe de l'Etoile, one of the most conspicuous and famous public structures in Paris, by which the Avenue des Champs Elysees, one of its most famous streets, was illuminated for four hours.

Of these events, also, I submit that your Honors will take judicial notice. So that it will hardly do to say that in 1857 electric lighting was wholly unknown. It is historically untrue to say that, and it was undoubtedly by an oversight that the Supreme Court of Missouri, in their opinion in this case, committed themselves to any such statement of fact.

But suppose it were true. Can anything be broader than the words "which may now or hereafter be used as a substitute therefor"? If those words do not embrace any possible improvement in any possible direction in the art of artificial lighting, I should like to know what they mean; and, if so, they embraced electric lighting whenever it should become known. We say it was known at the time. But whether it was or not, when it came to be known it was within the language of the charter.

There are several other points made by my friend, Mr. Marshall, which, I think, if discussed a little more fully, would tend to show what the trouble in this case is. A

good deal was said which certainly was wholly foreign to the merits of this controversy.

I do not quite understand the bearing of his remark, that if this company had the right to assign its franchises, the wealth of India would not purchase the franchise. Are we to understand that as a suggestion to this Court that the decision of this case may or should by any possibility depend, in any sense, directly or indirectly, upon the supposed pecuniary value of the franchises granted to the Laclede Gas Light Company by the State of Missouri in 1857? I am very sure my friend would hasten to disclaim any purpose of that kind. I do not understand that the question whether it is a valuable franchise or a valueless franchise has any bearing upon the legal rights of the company. I confess that I heard with regret expressions that might be unfortunately construed in that way.

As to what was said about monopoly and the terrible consequences to be apprehended from the privilege in the relator's charter of leasing, selling, or disposing of its franchises or any part thereof, it seems sufficient to refer to what my brief contains on those subjects. This charter confers no exclusive right, and it is not, therefore, a monopoly. The New Orleans Gas Company's rights were exclusive, but this court upheld them as having been granted by a valid statute, which no court has the right or power, even had it the inclination, to set aside; the expediency of such legislation being, as this court said in the *Louisville Gas Case*, in 115 United States, 698, "a matter for legislative determination, behind which the courts should not attempt to go." As to the relator's right to assign its franchises, the same remarks apply; and in any event, what difference can it make to the city or the public whether they are held by the relator or by any other person or persons standing in its shoes? What have suggestions like these to do with the merits of this case?

One statement made by Mr. Marshall I heard with great

surprise, namely, that the city of St. Louis had no intention of enforcing the payment of the 5 per cent. tax on gross receipts, the payment of which or an agreement to pay which, and to comply with every other ordinance that may be enacted hereafter, backed by a penal bond in twenty thousand dollars, is one of the express conditions prescribed by this ordinance. I do not know by what authority that statement was made or any such assurance given. Today for the first time have I heard any such intimation, and I am afraid that in respect of such a matter, a matter of municipal policy and purpose, not of professional advice or opinion, the authority of the city counsellor would not be sufficient.

The real controversy in this cause, as I have repeatedly said, is simply whether the relator shall be permitted to enjoy or shall be compelled to surrender its franchises derived from the State, at the mere demand and dictation of the city authorities of St. Louis. That is what it all means.

The city of St. Louis became a party to this suit voluntarily. It adopted the pleadings of its Street Commissioner, both as to facts and law. It is responsible for everything that has been done and said in the case since that time. It is not a question of a subordinate officer in any degree. We were very glad to have the city become a party. Your Honors will remember that in the opinion of the Supreme Court of Missouri, at an interlocutory stage of the cause, they declined to pass upon certain questions because the city was not a party; but the city became a party, and now the city is the avowed defendant, as it was the real defendant from the beginning.

What does the city demand? Aside from merely technical objections to the validity of the relator's charter and the rights its confers, the city bases its persistent refusal to permit the relator to exercise those rights upon the proposition that we have not complied with that ordinance. We set out that ordinance in full in our reply, so that there should be no mistake as to its scope and meaning, and I have en-

deavored to make plain to your Honors what it does really mean.

The very first requirement, the condition precedent to all else, is—and in this Mr. Marshall agrees with me—is that the relator shall obtain an ordinance from the Municipal Assembly authorizing it to carry on the electric lighting business in the city of St. Louis. Section 603 of the Revised Ordinance, 1892, begins with the explicit provision that no person or corporation shall place any wires conveying electricity along, across, or under any street in St. Louis unless he or it shall be duly authorized by the Municipal Assembly, and then only as hereinafter provided. That provision alone involves the whole controversy. Grant that, and the city authorities have *carte blanche* on which to write anything they choose. The rest is mere matter of detail, subject to alteration from time to time at the will of the city; but the permanence of the city's absolute control is secured by also requiring a formal acceptance of this ordinance, with an agreement to comply with any and all future ordinances of the Assembly and regulations of the Board of Public Improvements, secured by a bond in twenty thousand dollars, which also secures the payment of the 5 per cent. tax on gross receipts. And your Honors will observe that the provision in section 612, that no person, corporation, or association shall be entitled to *any of the privileges conferred by this article* (which covers the whole subject of the erection and maintenance of electric wires along, across, or under any and all the city streets for producing light, heat, or power), except upon the following conditions—that is, the conditions I have mentioned.

The question was asked whether the relator applied to the Board of Public Improvements for a permit. It did not. Why? Because such an application would have been an idle form.

Lex neminem ad vana cogit. The Board of Public Im-

provements is authorized by section 605 to receive applications for permits to occupy streets with electric wires, overhead or underground, accompanied by a plat and details of the route, &c.; but they can receive such applications only from persons or corporations duly authorized by the Municipal Assembly to do business in St. Louis, and of course they cannot examine or approve applications or grant permits to any others. All these questions were fully considered by counsel for relator, and it was manifest that there was no reason for making a request of the Board of Public Improvements which we knew they were bound to and would refuse, because the relator was not entitled to make it, under the terms of the ordinance itself, unless it was willing to and did surrender to the city its charter rights.

If all the city of St. Louis wants or has wanted has been that this company should submit its plans to the Board of Public Improvements, why have they not said so in the past three years? Why has the city stood firmly upon the proposition—"Until you comply with that ordinance you cannot lay your pipes." That is their position. There is no disclaimer or suggestion that it is not.

Mr. MARSHALL: May I answer that question?

Mr. HITCHCOCK: Certainly.

Mr. MARSHALL: We have not entered such a disclaimer because you never asked such a thing from the city.

Mr. HITCHCOCK: No; we have not, and the reason is obvious. The Laclede Gas Light Company, if it went to the city and offered to comply with that ordinance, would by so doing have said to the city, "Our charter rights are subject to your approval." Your Honors will readily understand that they could not take that position. A Board of Directors of a corporation who should ask permission from a third person to do that which their charter authorized them to do, under circumstances such as these, amounting to a surrender of the company's essential rights, would be faithless to their trust. It would have been a very simple

thing for the Municipal Assembly of St. Louis, if their sole purpose was to protect the public, to pass an ordinance providing that if any corporation claiming such franchises should file plans which are approved and which shall be consistent with the safety of the public they should be authorized to obtain the necessary permit.

I repeat it, this relator recognizes to the fullest extent its own obligations under its charter, as well as the rightful authority of the city in its proper sphere. But the position which the city authorities have constantly maintained as against the relator left it no alternative except to surrender its vested rights or contend for them in the courts.

The request of the relator to the Street Commissioner for a permit to excavate—not, of course, for a permit to lay conduits for its electric wires, for that its charter authorizes—was simply a recognition of the immediate duty and authority of that officer to keep the streets in good order, and to prevent unauthorized persons from excavating or otherwise injuring their surface. If relator's charter authorizes it to lay conduits such as it intended, then it was entitled to a permit to make the necessary excavations. The Street Commissioner was the proper and only city officer to give such permit; and, assuming relator's rights as I have stated them, it was his legal duty to comply with that request, and for his refusal to do so mandamus is the proper remedy.

Upon these grounds, together with the suggestions contained and authorities cited in the brief for the plaintiff in error, and sincerely acknowledging the patient and considerate attention received from your Honors, I respectfully submit the cause.

Brf. of Marshall for D. E.
Filed Dec. 31, 1895.

DEC 31 1895
JAMES H. MCKENNEY,
CLERK.

[15,957.]

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE STATE OF MISSOURI EX RELATIONE THE LACLEDE GAS LIGHT COMPANY,
Plaintiff in Error,

vs.

MICHAEL J. MURPHY, STREET COMMISSIONER OF THE CITY OF ST. LOUIS, AND THE CITY OF ST. LOUIS,
Defendants in Error.

No. 667.

STATEMENT, BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

W. C. MARSHALL,
Attorney for Defendants in Error.

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Defendants in Error.

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STATEMENT, BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

STATEMENT.

This is a proceeding by *mandamus* to compel the street commissioner of the City of St Louis and the City of St. Louis to grant to relator the right to make excavations in the streets of the City of St. Louis for the purpose of constructing conduits for

carrying electric wires to be used for the distribution of electricity for lighting purposes.

An alternative writ issued by the Supreme Court of Missouri on the 10th of December, 1894, is as follows:

ALTERNATIVE WRIT.

In the Supreme Court of Missouri. Division No. 1. October Term, 1894.

The State of Missouri on the relation of The Laclede Gas Light Company,
vs.
Michael J. Murphy, Street Commissioner of the City of St. Louis, Respondent.

The State of Missouri to Michael J. Murphy, Street Commissioner of the City of St. Louis:

Whereas the said Laclede Gas Light Company, lately in our Supreme Court, at the October Term, 1894, thereof, held at the City of Jefferson, on the 26th day of November, 1894, gave the same court to understand and be informed, to-wit, by the petition of said relator verified by affidavit filed in said court on said day, that you, the said Michael J. Murphy, street commissioner of the City of St. Louis, have arbitrarily, unlawfully, and contrary to your duty in that behalf, refused and still refuse to issue to said relator a certain permit by said relator applied for, as will more fully appear by reference to said petition, which is in the words and figures following, to-wit:

To the Honorable, the Judges of the Supreme Court of the State of Missouri.

The Laclede Gas Light Company, relator herein, gives the court to understand and be informed that

it, the said relator, is a body politic duly incorporated by an Act of the General Assembly of the State of Missouri, approved March 2d, 1857, entitled: "An act to incorporate The Laclede Gas Light Company:" that subsequently said act of March 2d, 1857, was amended by certain supplemental and amendatory acts, viz: "An act supplementary and amendatory of an act entitled 'An act to incorporate the Laclede Gas Light Company,'" approved March 3d, 1857; and "An act to amend an act to incorporate The Laclede Gas Light Company, approved March 26th, 1868; which said three Acts of the General Assembly of the State of Missouri are in words and figures, as follows:

An act to incorporate the Laclede Gas Light Company.

Be it enacted by the General Assembly of the State of Missouri, as follows:

§ 1. James M. Hughes, Edward Bredell, Robert Holmes, John C. Rust, Charles Gibson, Samuel H. Gardner, Henry A. Clover, and Archibald Gamble be, and they are hereby created and constituted a body politic and corporate by the style of "The Laclede Gas Light Company," and by that name they and their successors and assigns shall have perpetual succession, may contract and be contracted with, sue and be sued, and may also hold and convey, or otherwise manage and dispose of such property, real, personal and mixed, as may be necessary for the purposes of the said corporation and the prosecution of its legitimate business.

§ 2. The capital stock of said company shall be fifty thousand dollars, and the same may be in-

creased to two million dollars, which shall be divided into shares of one hundred dollars each.

§ 3. The affairs of said company shall be conducted by a board of not less than five directors, and such officers and agents as they may deem necessary; said directors to be chosen annually by the stockholders, each share of stock being entitled to one vote in such election, and they shall hold their offices for one year, and until their successors are elected and qualified; said directors shall have power to ordain and make all needful by-laws, rules and regulations, for the transaction of the business of said company; and, under the direction of the stockholders, may have absolute power over all the property and effects of said company. They may also fill vacancies in their board until the next regular election.

§ 4. The said corporators, or a majority of them, may at any time open books in the City of St. Louis for subscription to the capital stock of said company, and, upon the sum of fifty thousand dollars being subscribed, may organize said company under this charter.

§ 5. The said company, its successors and assigns, shall, within all that portion of the present corporate limits of the City of St. Louis, in St. Louis County, not embraced within the corporate limits of said city, as established by the act entitled "An act to incorporate the City of St. Louis," approved February 8, 1839, have and enjoy, during the continuance of this act, the sole and exclusive privilege and right of lighting the same, and of making and vending gas, gas lights, gas fixtures, and of any

substance or material that may be now or hereafter used as a substitute therefor; and to that end may establish and lay down in said portion of said corporate limits all pipes, fixtures, or other thing properly required, in order to do the same (the same to be done with as much dispatch and as little inconvenience to the public as possible), and shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company.

§ 6. The City of St. Louis and said company may make any contracts they may deem to their mutual advantage, in regard to the lighting of any parts of said portion of said corporate limits, or any other thing relating to the business and affairs of said company. The said city shall have the right, at the expiration of twenty years from the time of the organization of said company, under this charter, to purchase all the property and effects of the same, paying therefor to the same the value of such property and effects, with twenty per cent. added thereto, such value to be fixed by two appraisers, one to be chosen by the city and the other by the company, and if they cannot agree then the two thus chosen shall nominate a third man, and a decision of any two of the three shall be binding; and upon such purchase being made all such property and effects, and all rights and privileges granted to said company, shall immediately pass to and vest in said city. If said city fail so to purchase said property and effects, then this charter shall be and the same is hereby renewed and extended for the

further period of thirty years after the expiration hereof.

§ 7. Any person or body corporate who shall, within said portion of said corporate limits, interfere with the privileges hereby granted to said company, or exercise like acts or privileges, shall, for every such offense, forfeit and pay to such company one thousand dollars, and each day's continuance of such offense shall be construed to be, and be a new offense under this section.

§ 8. The said company and this act is hereby exempted from the operation of sections 6, 7, 13, 14, 15, 18 and 20, of article first of the act entitled, "An act concerning corporations," approved November 23, 1855.

§ 9. This act shall take effect from its passage, and shall continue in force for thirty years.

Approved March 2, 1857.

An act supplementary and amendatory of an act entitled "An act to incorporate the Laclede Gas Light Company."

Be it enacted by the General Assembly of the State of Missouri, as follows:

§ 1. The act to which this act is amendatory is hereby amended as that the words "sole and exclusive," in the fifth section of the act are stricken out.

§ 2. The City of St. Louis shall not be compelled, in any purchase which it may make under the sixth section of the before recited act, to pay more than the appraised value of the property and effects of the corporation created by said act, without any addition of percentage.

This act to take effect and be in force from and after its passage.

Approved March 3, 1857.

An act to amend an act to incorporate "The Laclede Gas Light Company." Approved March 2d, 1857.

Be it enacted by the General Assembly of the State of Missouri, as follows:

§ 1. The said "Laclede Gas Light Company," shall, and may within the corporate limits of the City of St. Louis, as the same are now or may hereafter be established, exercise, have, hold and enjoy forever, all the rights, privileges, and franchises granted to it by the fifth section of the act to which this act is amendatory, and may at any time lease, sell or dispose of any portion of said rights, privileges and franchises to individuals, associations or corporations, intending or desiring to exercise the same within any portion of the limits aforesaid.

§ 2. The capital stock of said company may be increased from time to time to such amount as may be necessary to carry on its business.

§ 3. Nothing in this act contained shall be construed as affecting the vested rights of the St. Louis Gas Light Company, and the sixth section of the said act to which this act is amendatory is hereby repealed.

§ 4. An act entitled "An act supplementary and amendatory of an act entitled an act to incorporate the Laclede Gas Light Company," approved March 3d, 1857, is hereby repealed.

§ 5. This act shall take effect from its passage. Approved March 26th, 1868.

Said relator further shows to the court: That said act of March 2d, 1857, as amended by said subsequent acts, constitutes the present charter of the relator, which charter it has duly accepted, under which it has organized and carried on business, and which is in full force and effect. That by said charter relator is granted the privilege and right of lighting the City of St. Louis throughout its corporate limits, and of making and vending gas, gas lights, gas fixtures, and any substance or material that may be now or hereafter used as a substitute therefor; and to that end may establish and lay down in any portion of said corporate limits all pipes, fixtures, or other thing properly required in order to do the same, with this limitation only, that in laying down pipes, fixtures, or other thing properly required therefor, relator shall do the same with as much dispatch and as little inconvenience to the public as possible.

And by said charter relator is invested with all other powers necessary to execute and carry out the privileges and powers expressly granted to it, but relator further states and shows to the court that on the 28th day of February, 1873, a certain agreement, known as the "Tripartite Agreement," was made and executed by and between the City of St. Louis, the St. Louis Gas Light Company and the Laclede Gas Light Company, to-wit, this relator, in and by which agreement, for certain valuable considerations therein set forth, this relator abandoned and surrendered any and all *exclusive* rights and all claims or pretenses of claims of sole or exclusive privilege or right of lighting any part of the City of

St. Louis with gas, or making or vending gas, gas lights, or gas fixtures, and also all exclusive rights whatsoever under its said charter.

Relator further states that in pursuance of the terms and its charter it has for a long time past been engaged in the lighting business, both by gas and electricity; that under a contract with the City of St. Louis it is lighting a part of the public streets and alleys of said city by electricity, and will be obliged to do so for a number of years to come; that it is furnishing light by means of gas or electricity to many thousands private consumers in said city, being a large part of the inhabitants thereof; that in order to fulfill its obligations to the city and the public under its charter it has erected and maintains extensive and costly plants for the manufacture and distribution of gas as well as for generating and distributing electric currents; that for distributing gas it has from time to time constructed and maintained and now maintains a system of pipes laid under ground along the streets of the City of St. Louis as it was at all times authorized to do by its said charter, nor has the City of St. Louis ever objected to its so doing or disputed relator's right to do so; that for the distribution of electricity relator has hitherto used overhead wires strung upon poles along the streets and alleys of said city, which poles and electric wires have been and are maintained and used by relator without objection by said city or the authorities thereof for the distribution of electricity. as well to furnish light to private consumers as for the fulfillment by relator of its said contract with said City of St. Louis for the lighting

by electricity of certain public streets and alleys thereof; that to effect such distribution it is necessary to transmit through and by means of said wires electric currents of great power, which if and when accidently diverted are dangerous to human life and property; that in order to avoid the increasing inconvenience and danger to the public necessarily incident to that method of distributing electric currents and in order to provide more effective and proper service, relator has made arrangements to lay its wires under ground along and under the streets of said city according to approved and practicable plans and is now ready to do so with as much dispatch and as little inconvenience to the public as possible.

Relator states that Michael J. Murphy is and was at or before the time hereinafter referred to, street commissioner of the City of St. Louis duly appointed, qualified and acting as such under its charter, and as such are committed to him under said charter the supervision and control of the streets and alleys of said city and the enforcement of city ordinances relating thereto.

Relator further states that having completed its preparation to carry out the work above indicated and having given previous notice of its intention to do so to the said street commissioner of the City of St. Louis, it did on the 30th day of October, 1894, proceed with a number of men required for that purpose to begin the work of excavating at a point on the east side of Broadway, being one of the public streets of said city, near the corner of Mound street, the said point being adjacent to relator's

generating plants, which work of excavating was proper and necessary for placing its wires under ground; whereupon a police force of the City of St. Louis, acting under the instruction and at the instigation and request of said Michael J. Murphy, respondent, who was therein acting as street commissioner of said city, stopped relator's men from proceeding with said work, and caused relator's employes engaged in said work to be arrested, and said street commissioner, respondent herein, notified relator that he would not allow any part of any street of said city to be excavated for any purpose whatever without a permit previously obtained from him for that purpose as provided by ordinance. And relator states that by Section 568, Article 1, Chapter 15, of the Revised Ordinance, 1887, of said City of St. Louis, it is provided, that: "No person "shall make or cause to be made any excavation on "any public street, highway or alley, without writ- "ten permission of the street commissioner so "to do, excepting public work done under the "authority of the water or sewer commissioner, who "at the time of ordering any such excavation shall "notify the street commissioner of the same."

That upon being so notified by said respondent, street commissioner as aforesaid, relator applied to said respondent, as such street commissioner, for a permit to make the necessary excavation on Broadway so that it might lay its wires under ground for the purposes aforesaid and in pursuance of its said charter rights and privileges, but said street commissioner arbitrarily, unlawfully and contrary to his duty as such street commissioner in that behalf,

refused and still refuses to issue to relator any permit to excavate any part of any street of said city for said purpose, and also refused and still refuses to let relator make any such excavation without a permit, and threatens and still threatens to cause the arrest of any person who might thereafter enter upon or begin any such excavation for said purpose of laying any wire of relator's under ground, so that relator has been and is by said street commissioner absolutely prevented from exercising one of its vested rights granted by the State of Missouri and hitherto exercised by relator without let or hinderance, viz: to lay down in the streets of St. Louis all pipes, fixtures, or other thing properly required, in order to carry on the business for which relator's corporation was organized.

Relator states and shows to the court that it was and is the duty of said Michael J. Murphy, as such street commissioner of the City of St. Louis, to issue to it, said relator, a permit such as by it applied for as aforesaid, so that relator may without interference by the police or other authorities of said city exercise its charter powers and rights in that behalf above mentioned.

And relator states that by reason of the premises relator has been and is entirely without remedy in the premises unless it be afforded by the interposition of this Honorable Court by its writ of *mandamus*, and it therefore prays that a writ of *mandamus* may issue against said Michael J. Murphy, Street Commissioner of the City of St. Louis, commanding him to issue a permit to the relator to make an excavation along the east side of Broadway as near the

curb as practicable and extending from the southeast corner of Mound street and Broadway to the southeast corner of Olive and Broadway, in so far as such excavation may be necessary for the purpose of laying relator's electric wires under ground, the same to be done with as much dispatch and as little inconvenience to the public as possible. And relator prays for such other process, orders and remedies as may to the court seem meet and proper.

THE LACLEDE GAS LIGHT COMPANY,
by Isaac H. Lionberger, Vice-President.

HENRY HITCHCOCK,
LIONBERGER & SHEPLEY and
G. A. FINKELNBURG,
Attorneys for Relator.

State of Missouri, }
City of St. Louis. } ss.

Isaac H. Lionberger, undersigned, being first duly sworn, on his oath states, that affiant is the vice-president of the Laclede Gas Light Company, the petitioner and relator in this behalf; that affiant has read the foregoing petition and knows the contents thereof, and that the several matters and things in said petition set forth are true to the best of his knowledge and belief.

ISAAC H. LIONBERGER.

Subscribed and sworn to before me this Nov. 23d, 1894.

(Notary's Seal.) GEORGE M. BLOCK,
Notary Public.

Term expires June 28, 1897.

And whereas upon consideration thereof it was ordered that an alternative writ of *mandamus* should issue:

Now, therefore, you, Michael J. Murphy, Street Commissioner of the City of St. Louis, are hereby commanded to forthwith issue to the said Laclede Gas Light Company a permit to make an excavation along the east side of the public street called Broadway in the City of St. Louis, State of Missouri, as near the curb as practicable, and extending from the southeast corner of said Broadway and Mound street to the southeast corner of Broadway and Olive street in said city, so far as such excavation may be necessary for the purpose of laying under ground the electric wires of said Laclede Gas Light Company, the same to be done with as much dispatch and as little inconvenience to the public as possible, or that you show cause before this court on the 14th day of January, A. D. 1895, why you refuse to do so.

Witness the Honorable Francis M. Black, Chief Justice of the Supreme Court of Missouri, the 10th day of December, A. D. 1894. Issued at office in the City of Jefferson, State of Missouri, under the seal of the said court, the day and year last aforesaid.

JNO. R. GREEN,
Clerk of said Court.

RETURN.

Respondents made the following return to the alternative writ:

In the Supreme Court of Missouri. October Term, 1894.

State of Missouri *ex rel.* The Laclede Gas Light Co., Relator,
vs.
M. J. Murphy, Street Commissioner of the City of St. Louis, Respondent.

Now comes said respondent and for return to the alternative writ of *mandamus* heretofore issued in this case commanding respondent to show cause why he refuses to issue a permit to relator to make an excavation along the east side of Broadway from the southeast corner of Mound street and Broadway to the southeast corner of Olive street, in the City of St. Louis, for the purpose of laying electric wires under ground, respectfully represents and shows unto the court, that it is true, as stated by relator, that the General Assembly of Missouri, by an act entitled: "An act to incorporate the Laclede Gas Light Company," approved March 2d, 1857, and by an act entitled: "An act supplementary and amendatory of an act entitled: 'An act to incorporate the Laclede Gas Light Company,'" approved March 3d, 1857, the relator became a body corporate; that it is also true that the General Assembly of Missouri passed an act entitled: "An act to amend an act to incorporate 'The Laclede Gas Light Company.'" approved March 26th, 1868.

Respondent further shows unto the court that said act, approved March 2d, 1857, constitutued James M. Hughes and seven (7) others a body politic and corporate under the style of "The Laclede Gas Light Company," and provided that, "by that name they and their successors and assigns shall

have perpetual succession," and that said company "shall, within all that portion of the present corporate limits of the City of St. Louis, in St. Louis County, not embraced within the corporate limits of said city, as established by an act entitled, 'An act to incorporate the City of St. Louis,' approved February 8th, 1839, have and enjoy, during the continuance of this act, the sole and exclusive privilege and right of lighting the same and of making and vending gas, gas lights, gas fixtures and of any substance or material that may be now or hereafter used as a substitute therefor; and to that end may establish and lay down in said portion of said corporate limits all pipes, fixtures or other thing properly required in order to do the same (the same to be done with as much dispatch and as little inconvenience to the public as possible), and shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company;" that by said act it was further provided that "the said city shall have the right, at the expiration of twenty years from the time of the organization of said company, under this charter, to purchase all the property and effects of the same, paying therefor to the same the value of such property and effects with twenty per cent. added thereto, such value to be affixed by two appraisers, one to be chosen by the city and the other by the company, and if they cannot agree then the two thus chosen shall name a third man, and the decision of any two of the three shall be binding; and upon such purchase being made all such property and effects, and all

rights and privileges granted to said company shall immediately pass to and vest in said city.

If said city fail so to purchase said property and effects then this charter shall be and the same is hereby renewed and extended for the further period of thirty years after the expiration hereof;" that it was further provided by said act that said company should be exempted from the operation of Secs. 6, 7, 13, 14, 15, 18 and 20 of Art. 1, of an act entitled: "An act concerning corporations," approved November 23, 1855; that it was provided by Sec. 9 of said act as follows: "This act shall take effect from its passage, and shall continue in force for thirty years."

Respondent further shows unto the court that by the supplementary act, approved March 3d, 1857, it was provided that the words "sole and exclusive" in the 5th section of the act approved March 2d, 1857, should be stricken out, and further that the City of St. Louis should not be compelled, in any purchase which it might make under the Act of March 2d, 1857, to pay more than the appraised value of the property and effects, without any additional percentage.

Respondent further shows unto the court that the act approved March 26th, 1868, entitled: "An act to amend an act to incorporate the Laclede Gas Light Company," approved March 2d, 1857, was as follows: "Section 1. The said 'Laclede Gas Light Company' shall, and may within the corporate limits of the City of St. Louis, as the same are now or may hereafter be established, exercise, have, hold and enjoy forever, all the rights, privileges

and franchises granted to it by the 5th section of the act to which this act is amendatory, and may at any time lease, sell or dispose of any portion of said rights, privileges and franchise to individuals, associations or corporations, intending or desiring to exercise the same within any portion of the limits aforesaid.

Section 2. The capital stock of said company may be increased, from time to time, to such amount as may be necessary to carry on its business.

Section 3. Nothing in this act contained shall be considered as affecting the vested rights of the St. Louis Gas Light Company, and the sixth section of the said act to which this act is amendatory is hereby repealed.

Section 4. An act entitled: 'An act supplementary and amendatory of an act entitled "An act to incorporate the Laclede Gas Light Company," ' approved March 3d, 1857, is hereby repealed.

Section 5. This act shall take effect from its passage."

I.

Respondent further shows unto the court that the said act approved March 26th, 1868, is unconstitutional, null and void, and is in conflict with Par. 2 of Sec. 1, of Art. 8 of the Constitution of Missouri, 1865, which provides as follows: "No law shall be passed reviving or re-enacting any act heretofore passed, creating any private corporation, where such corporation shall not have been organized and commenced the transaction of its business within one year from the time such act took effect, or within

such other time as may have been prescribed in such act for such organization and commencement of business."

Respondent further shows unto the court that the Laclede Gas Light Company did not, within one year from the time the Act of March 2d, 1857, took effect, organize, neither did it commence the transaction of its business within one year after the said Act of March 2d, 1857, took effect, but on the contrary said Laclede Gas Light Company did not commence business until, to-wit, the year 1873, and therefore respondent avers that the act, approved March 26th, 1868, was in conflict with said Par. 2, Sec. 1, Art 8, of the constitution of 1865; and respondent further avers that said Act of March 26th, 1868, was an act reviving and re-enacting the Act of March 2d, 1857.

II.

Respondent further shows unto the court that said Act of March 26th, 1868, is null and void and in conflict with Sec. 25, Art, 4, of the Constitution of Missouri, 1865, which section is as follows: "No act shall be revived or re-enacted by mere reference to the title thereof; nor shall any act be amended by providing that designated words thereof shall be struck out, or that designated words shall be struck out and others inserted in lieu thereof; but in every such case the act revived or re-enacted, or the act or part of act amended shall be set forth and published at length, as if it were an original act or provision."

Respondent further shows unto the court that said Act of March 26th, 1868, is an act reviving and re-

enacting the Act of March 2d, 1857, and that it does not set forth and publish at large the Act of 1857, as revived and re-enacted by the Act of 1868, and that in order to ascertain and determine the meaning of the Act of 1868 it is necessary to compare the Act of 1868 with the Act of 1857, and that without such comparison the Act of 1868 is wholly unintelligible; that the Act of 1868 refers to the rights, privileges and franchises granted by Sec. 5 of the act to which it is amendatory, which is the Act of March 2d, 1857, and that it is hence necessary to refer to the 5th Sec. of the Act of March 2d, 1857, to determine what rights, privileges and franchises were granted by that section, and that it is therefore null and void because it does not set forth and publish at length, as if it were an original act or provision, what rights, privileges and franchises were intended to be granted; and that said Act of March 26th, 1868, violates Sec. 25 of Art. 4 of the Constitution of Missouri, 1865, in that by the 3d section of said act it attempts to repeal the sixth section of the said act to which this act is amendatory, without setting forth and publishing at length, as if it were an original act or provision, the amendment; and that it is further void under said constitutional provision in that it strikes out from the Act of March 2d, 1857, designated words thereof; and that it is further void because it strikes out from Sec. 1 of the Act of March 2d, 1857, the words "and their successors and assigns shall have perpetual succession," and strikes out from Sec. 5 of the Act of March 2d, 1857, the words "during the continuance of this act" and substitutes therefor the word

"forever," without setting forth and publishing at length the said amendment as if it were an original act or provision.

III.

Respondent further shows unto the court that the charter of the relator by the terms of Sec. 9 of the Act of March 2d, 1857, expired on the 2d of March, 1887, and that relator therefore is not entitled to any of the privileges, rights or franchises claimed by it.

IV.

For further and separate return respondent shows unto the court that even conceding all that relator claims with reference to the validity of the Act March 26th, 1868, and of the Act March 2d, 1857, nevertheless relator is not entitled to the relief asked for in this case, because respondent says that it has never by any act been granted a franchise to make and vend electricity for any purpose whatever, but that whatever rights, privileges and franchises it ever enjoyed were confined to making and vending gas, gas lights, gas fixtures and any substance or material used as a substitute therefor, and that electricity whether used for lighting or power purposes is not a substance or material, and hence relator has not any right to make or vend the same anywhere.

Respondent further shows unto the court that relator has heretofore placed its pipes and fixtures beneath the surface of the street on the east side of Broadway from Mound street to Olive street, and at divers and sundry other places beneath the surface

of the streets of the City of St. Louis, for the purpose of transmitting and vending and supplying gas to consumers in the City of St. Louis; that in order to convey electricity it is necessary to carry the same by means of wires strung on poles above the surface of the streets or by means of wires strung in non-conductive tubes or conduits beneath the surface of the streets, and that relator has never acquired from the State of Missouri or the City of St. Louis any right to place such wires above or beneath the streets of said city.

V.

That it is provided by Sec. 2721 of Art. 5 of Chap. 42, Rev. Stats. 1889, that no company shall place its wires and other fixtures under ground in any city unless it shall first obtain consent from said city, through the municipal authorities thereof.

VI.

And that it is provided by Art. 2, Chap. 15, Rev. Ordinance of the City of St. Louis, 1887, as the same has been amended by Ord. No. 16,894, that no wires, tubes or cables conveying electricity for the production of light, heat or power, shall hereafter be placed along or across any of the streets, alleys or public places in the City of St. Louis, by any person, corporation or association not having, previous to the passage of this ordinance, accepted and complied with Ordinance No, 12,723, now amended, or shall be duly authorized by the municipal assembly, and then only upon condition that such person, corporation or association so author-

ized by ordinance, before placing its wires, tubes and cables underground, shall file in the office of the Board of Public Improvements an application therefor, stating in detail the streets, alleys or public places which said wires, tubes or cables are to occupy, and the manner in which said wires, tubes or cables are to be secured or supported and insolated, together with a plat showing the route of such wires, tubes and cables, and that thereupon, if the same is approved, the Board of Public Improvements shall grant a permit therefor, subject to such restrictions, regulations and qualifications as may be prescribed by said board and all such work shall be done under the supervision of and to the satisfaction of the supervisor of city lighting, and that whenever an alley is available for placing such wires, tubes, or cables, the same shall be placed in or under alleys and not along or under streets; that relator has never accepted the provisions of said article and chapter, nor of said Ordinance No. 16,894, nor has it ever been authorized by the Municipal Assembly of St. Louis to place its wires, tubes and cables under the streets or alleys of St. Louis.

Respondent further shows unto the court that said ordinance provisions are legal and binding and valid provisions, and such as the City of St. Louis had the right to adopt and enact under Par. 2, of Sec. 26, of Art. 3 of the charter of St. Louis, which gives said city the power to regulate the use of all streets, avenues, alleys and so forth in said city, and such ordinance provisions are legal enactments, notwithstanding any rights which relator now has,

or may heretofore have had, by virtue of any act of the General Assembly of Missouri.

Respondent further shows unto the court that relator has never made application to the Board of Public Improvements for a permit to place its wires, tubes and cables under ground in said city, nor has it complied, in any manner, with any of the ordinance provisions aforesaid, and that respondent has not the power to grant any such permit as is asked for by relator in this case.

VII.

Respondent further shows unto the court that on the 2d of March, 1857, lighting by electricity was wholly unknown to art, and that the General Assembly of Missouri, by the Act of March 2d, 1857, did not, and did not intend to confer, upon relator, the right to manufacture and vend electricity for lighting purposes.

VIII.

Respondent further shows unto the court that it is likewise true that on the 26th of March, 1868, lighting by electricity was wholly unknown to art, and that the General Assembly of Missouri did not and did not intend to confer upon relator by the Act of March 26th, 1868, the right to manufacture and vend electricity for lighting purposes.

Wherefore, having fully made return to the alternative writ herein, respondent asks to be hence dismissed with his costs.

W. C. Marshall,
Attorney for Respondents.

Relator demurred specially to parts of respondent's return and moved to strike out other parts thereof.

The demurrer and motion to strike out are as follows:

In the Supreme Court of Missouri. October Term, 1894.

The State of Missouri *ex relatione* The Laclede Gas Light Company, Relator,
vs.
Michael J. Murphy, Street Commissioner of the City of St. Louis, Respondent.
No. 7434.

Now comes said relator, by its attorneys of record, and demurs specially to the following portions of the return of said respondent to the alternative writ of *mandamus* issued in this behalf, and to each of them, that is to say:

1. To that portion of said return, beginning on line 6 of page 4 thereof, with the words "Respondent further shows unto the court that the said act, approved March 26, 1868," and ending on line 26 of said page 4,, with the words "Was an act reviving and re-enacting the Act of March 2, 1857."

And for grounds of said demurrer relator shows the court:

That the said act, approved March 26, 1868, as by the terms thereof appears, is not, nor purports to be a law reviving or re-enacting any act theretofore passed, and is not, therefore, within the provisions of, nor in conflict with, paragraph 2 of section 1 of article 8 of the Constitution of Missouri, 1865, also,

That even if the said act, approved March 26, 1868, had been a law reviving or re-enacting any act theretofore passed creating any private corporation,

yet relator says that its charter, to-wit, the said Act of March 2d, 1857, was not, nor is within the provisions of paragraph 2 of section 1 of article 8 of the Constitution of Missouri of 1865, because the said Act of March, 2d, 1827, by which, as set forth in relator's petition herein, and admitted in said respondent's return, James M. Hughes and others were, at and from the date of the approval of said act, constituted a body politic and corporate under the style of the Laclede Gas Light Company, did not prescribe any time within which said corporation should be organized or commence the transaction of its business, but on the contrary, to-wit, by section 8 of said act, expressly exempted the said Laclede Gas Light Company and the said charter thereof from the operation of sections 6 and 7 of article first of the general law of the State of Missouri concerning corporations then in force, to-wit, sections 6 and 7 of "An act concerning corporations," approved November 23d, 1855. Wherefore, relator says that from and after the approval of said act, approved March 2, 1857, the said Laclede Gas Light Company, to-wit, this relator, was and continued to be completely vested with all and singular the corporate rights and powers in its said charter mentioned, without any limitation as to the time of its organization or of commencing the transaction of its business, and that said charter was a contract by the State of Missouri with said corporation, in virtue whereof the said charter and the corporate powers therein granted were not subject to alteration, suspension or repeal by any subsequent legislation on the part of the said State.

Wherefore, relator says that the matters averred in said portion of said respondent's return above mentioned constitute no defense to this proceeding.

Relator further demurs:

2. To that portion of said return, on pages 4, 5 and 6 thereof, beginning on page 4, with the words "Respondent further shows unto the court that said Act of March 26th, 1868, is null and void," and ending on line 4 of page 6, with the words—"as if it were an original act or provision."

And for grounds of said demurrer relator shows the court:

That said Act of March 26, 1868, was not, nor by its terms purported to be, an act reviving or re-enacting said Act of March 2, 1857, but was and purported to be an act to amend said Act of March 2, 1857, which act last mentioned was at the date of said amendatory act in full force.

That said amendatory Act of March 26th, 1868, was in no respect in conflict with the provisions of section 25 of article 4 of said Constitution of Missouri, 1865, nor failed in any respect to comply with any provision thereof concerning amendments, such as therein referred to, or which required the setting forth or publishing at length such amendments.

That said Act of March 26th, 1868, did not amend, nor purport to amend, said Act of March 2d, 1857, by providing that any designated words thereof should be struck out, or that designated words should be struck out and others inserted in lieu thereof, and was not in conflict with the provisions of said section 25 of article 4 of said Constitution of Missouri of 1865, or any of them, but

was a valid amendment, to-wit, to the extent of and in accordance with its terms, of the said act, approved March 2d, 1857.

Wherefore, relator says that the matters averred in said portion of respondent's return last above mentioned, constitute no defense to this proceeding.

Relator further demurs:

3. To the following portion of said return, contained in lines 5 to 9, inclusive, on page 6 thereof, to-wit:

"Respondent further shows unto the court that the charter of the relator by the terms of Sec. 9 of the Act of March 2d, 1857, expired on the 2d of March, 1887, and that relator therefore is not entitled to any of the privileges, rights or franchises claimed by it."

Because the averments therein contained constitute no defense to this proceeding; for that the construction therein sought to be placed by respondent upon said Act of March 2d, 1857, is erroneous, and is not consistent with the other provisions of said act as set out in relator's petition and admitted in said respondent's return, nor with other material averments in said return contained.

Because section 6 of said Act of March 2d, 1857, which authorized the City of St. Louis, at the expiration of twenty years from the time of the organization of said company, to-wit, this relator, under said charter, to purchase all the property and effects of said company upon terms therein stated, further provided that if said city should fail so to purchase said property and effects, then said charter

should be and the same was thereby renewed and extended for the period of thirty years after the expiration thereof; and it does not appear, nor is by respondent in said return alleged, that the City of St. Louis has ever purchased or offered to purchase the property and effects of relator or any part thereof as by said section 6 authorized.

Relator further shows the court:

That if the act, approved March 26th, 1868, amending said Act of March 2d, 1857, was and is null and void, as by respondent in said return alleged, then said section 6 of said Act of March 2d, 1857, was not repealed thereby, but remained in force; and since it does not appear, nor is averred in said respondent's return, that the said City of St. Louis ever purchased or offered to purchase the property or effects of relator, the charter of said relator, to-wit, the said Act of March 2d, 1857, and all rights and privileges thereby granted to relator were by the express provisions of said section 6 thereof renewed and extended for thirty years after the expiration of the period mentioned in section 9 of said Act of March 2d, 1857, to-wit, until March 2d, 1917, and are now still in force.

But if, as relator contends, said Act of March 26th, 1868, was and is a valid act, in amendment of said Act of March 2d, 1857, then relator was and still is entitled, under said Act of March 2d, 1857, as so amended, to exercise, have, hold and enjoy, all and singular, the corporate rights, privileges and franchises granted by its said charter as so amended.

Wherefore, relator says that in any event its charter is and remains in full force, and said portion

of said return last above mentioned sets forth no defense to this proceeding, nor any reason why relator should not have the relief sought herein.

Relator further demurs.

4. To that portion of said return beginning with the words "And that it is provided by Article 2, Chap. 15, Rev. Ordinance of the City of St. Louis, 1887," in line 7 of page 7 of said return, and ending with the words "as is asked for by relator in this case."

And for grounds of said demurrer, relator shows the court:

That by the terms of said act to incorporate the Laclede Gas light Company, approved March 2d, 1857, being the original charter of relator, as set forth in said alternative writ and admitted by said respondent's return, special reference being had to section 8 of said act, the said charter was and is a contract between the State of Missouri and said corporation, not subject to alteration, suspension or repeal, except with the consent of said corporation: and that any constitutional provision, law or municipal ordinance adopted or enacted after said date by, or by authority of said State or by any municipality thereof, inconsistent with any right, privilege or franchise granted by said charter to relator, or the effect of which would be to deny to relator any such right, privilege or franchise, or to annex to the full exercise thereof by relator any condition or requirement not prescribed by said charter, would be in contravention of section 15, of article 2, of the Constitution of Missouri, 1875, forbidding the General Assembly to pass any law impairing the obliga-

tion of contracts, and also of section 10, of article 1, of the Constitution of the United States, forbidding any State to pass any such law.

That the provisions of said ordinances of said City of St. Louis in said portion of said return mentioned, if held valid or binding upon relator, would necessarily impair the obligation of the contract between relator and said State of Missouri contained in said charter, by annexing to the exercise by relator of the rights and privileges by said charter granted to it, certain conditions and requirements not prescribed by said charter, and which it does not appear, nor is by respondent averred that the relator has ever consented to or accepted.

Wherefore, relator says that the matters averred in said portion of respondent's return last mentioned do not, nor does any of said matters, constitute any defense to this proceeding, nor any reason why the relief here sought by relator should not be granted.

(Signed) HENRY HITCHCOCK,
G. A. FINKELNBURG,
I. H. LIONBERGER,
Attorneys for said Relator.

In the Supreme Court of Missouri. October Term, 1894.

The State of Missouri *ex relatione* The Laclede Gas Light Company, Relator,
vs.
Michael J. Murphy, Street Commissioner of the City of St. Louis, Respondent.
} No. 7434.

Now comes said relator and moves the court to strike out the following portions of respondent's

return to the alternative writ in this behalf, to-wit:

1. That portion of said return contained in lines 10 to 21 on page 6 thereof, as follows:

"For further and separate return respondent shows unto the court that even conceding all that relator claims with reference to the validity of the Act of March 26th, 1868, and of the Act of March 2d, 1857, nevertheless relator is not entitled to the relief asked for in this case, because respondent says that it has never by any act been granted a franchise to make and vend electricity for any purpose whatever, but that whatever rights, privileges and franchises it ever enjoyed were confined to making and vending gas, gas lights, gas fixtures and any substance or material used as a substitute therefor, and that electricity whether used for lighting or power purposes is not a substance or material, and hence relator has not any right to make or vend the same anywhere."

And for grounds of said motion, relator shows to the court:

That the matters averred in said portion of said return are immaterial and not responsive to the averments in relator's petition or the relief sought therein, but on the contrary respondent attempts thereby to tender a false and immaterial issue in respect of the right alleged and relief sought by relator in and by its petition in this behalf.

Forasmuch as the privilege and right which relator seeks by this proceeding to enforce, as by its said petition appears, is the said right of relator, under its said charter, to establish and lay down in the streets of the City of St. Louis all pipes, fixtures

or other thing properly required in order to carry on the business of lighting the City of St. Louis and the business of making and vending gas, gas lights, gas fixtures and any substance or material which at the date of said charter was or thereafter might be used as a substitute therefor; and especially the right which relator claims under said charter to lay down under said streets in pipes or conduits suitable therefor wires by means of which to transmit currents of electricity for the production of electric light as a substitute for gas light.

Relator further shows to the court that it is matter of common knowledge, and of which relator submits that the court will take judicial notice, that in making or producing gas light, by means of ordinary illuminating gas, the carbon which is a component part or element of such gas, is brought to a condition of incandescence by the application of heat; and it is also matter of common knowledge, of which the court will take judicial notice, that in making or producing electric light, which for years past has been and is now largely used as a substitute for gas light, the carbon which is used for arc lights, in the form of rods or pencils, and for incandescent lamps in the form of a thread or filament, is brought to a condition of incandescence by generating and transmitting through said carbon what is called electricity; the light or illumination produced in either case being, as is commonly known, the result of the incandescent condition of the carbon used and the effect thereof upon the organs of sight.

That as averred in the petition of relator herein,

and not denied in said respondent's return, relator has for a long time past carried on the business of making and vending to the City of St. Louis, under a contract with said city therefor, and to many of the inhabitants thereof, as a substitute for gas light, what is called electric light, that is to say, light radiating from carbon rods or carbon filaments heated to incandescence by means of electricity, as above mentioned, instead of light radiating from particles of incandescent carbon in the flame of burning gas, thereby substituting one form of incandescent carbon for another form thereof, each of said forms of carbon being a substance or material within the meaning of the relator's charter and within the corporate rights and powers thereby conferred on relator. And relator says that in proposing, as in its said petition set forth, to establish and lay down in the streets of St. Louis a system of wires strung or laid in underground pipes or conduits, as a substitute for the overhead wires strung on poles along said streets hitherto used by it, so as by means of said underground wires more conveniently and safely to transmit or convey to such carbon rods or filaments the electric currents which, as admitted by respondent's return, it is necessary to convey by means of wires strung either on poles or in underground conduits in order to make said carbons incandescent, thereby producing electric tight as a substitute for gas light, relator purposes to substitute for the gas pipes and fixtures which formerly were alone used by it in carrying on the business authorized by its charter, pipes or conduits and wires such as properly required for said

purpose, also arc lamps and carbons used therfor and incandescent lamps and carbon filaments which are a necessary part thereof, each and all of which pipes or conduits, wires, arc or incandescent lamps and carbon rods or filaments, respectively, relator avers are substances and materials within the meaning and intent of said charter of relator.

Wherefore, relator says that whether what is called electricity, by means whereof said carbon rods and filaments are rendered incandescent and caused to radiate light as aforesaid, is or is not a substance or material, is an issue wholly foreign and immaterial to the questions arising upon the said alternative writ, that is to say, as to the right of relator under its charter to make and vend electric light as a substitute for gas light, and its right for that purpose to make use of incandescent carbon in the form of rods or filaments as a substitute for incandescent gas, and to use arc and incandescent lamps with carbon rods or filaments as a substitute for gas fixtures, and to that end, in lieu of and as a substitute for under ground gas pipes and gas fixtures and apparatus connected therewith, to establish and lay down in the streets of said City of St. Louis such pipes or conduits as may be properly required for the maintenance of wires for the transmission of electricity: inasmuch as relator avers that the determination of that question or pretended issue would not in any manner assist or enable this court to adjudicate or pass upon any right in this behalf alleged or claimed by relator. And the said portion of said respondent's return should therefore be disregarded and stricken out as immaterial.

2. Also that portion of said respondent's return contained in lines 3 to 6, inclusive, on page 7 thereof, as follows:

"That it is provided by Section 2721 of Art. 5 of Chap. 42, Rev. Stats. 1889, that no company shall place its wires and other fixtures under ground in any city unless it shall first obtain consent from said city, through the municipal authorities thereof."

And for grounds thereof, relator shows the court—

That the said provision alleged by respondent to be part of Section 2721 of Article 5, Chapter 42, of the Revised Statutes of Missouri, 1889, does not truly or correctly set forth the purport or intent of the statutory provision therein referred to, in this, that the provisions of said Section 2721, by their terms, expressly relate only to telegraph and telephone companies organized under the provisions of said article 5, Chapter 42, of said Revised Statutes of 1889, and do not relate nor purport to relate in any manner to any corporation except telegraph or telephone companies, nor to any such companies except such as shall have been organized under the provisions of said Article 5, of said Chapter 42, of said Revised Statutes.

Wherefore, relator says that said portion last mentioned of said return is irrelevant and immaterial to any question involved in this proceeding and constitutes no defense thereto.

3. Also that portion of said respondent's return contained in lines 18 to 22, inclusive, on page 8 thereof, as follows:

"Respondent shows unto the court that on the

2d of March, 1857, lighting by electricity was wholly unknown to art, and that the General Assembly of Missouri, by the Act of March 2d, 1857, did not, and did not intend to confer upon relator the right to manufacture and vend electricity for lighting purposes."

And for grounds of said motion, relator shows the court:

That said portion of said return last mentioned is immaterial and irrelevant to the questions presented by relator's petition and the alternative writ in this behalf, and constitutes no defense to said alternative writ or to the relief sought by relator in this proceeding.

Because it appears from the terms of said Act of March 2d, 1857, that the State of Missouri thereby, to-wit, by the fifth section of said act, expressly granted to relator the corporate right and privilege of making and vending gas, gas lights or gas fixtures, and any substance or material that might then or thereafter be used as a substitute therefor, without annexing to such right any condition that such substitute should be only such as was known to art at the date of the approval of said act.

4. Also that portion of said respondent's return contained in lines 23 to 28, inclusive, on page 8 thereof, as follows:

"Respondent further shows unto the court that it is likewise true that on the 26th of March, 1868, lighting by electricity was wholly unknown to art, and that the General Assembly of Missouri did not, and did not intend to confer upon relator, by the

Act of March 26, 1868, the right to manufacture and vend electricity for lighting purposes."

And for grounds of said motion, relator shows the court:

That said portion of said return last mentioned is immaterial and irrelevant to the questions presented by relator's petition and the alternative writ in this behalf, and constitutes no defense to said alternative writ or to the relief sought by relator in this proceeding.

Because it appears from the terms of said Act of March 2d, 1857, that the State of Missouri thereby, to-wit, by the fifth section of said act, expressly granted to relator the corporate right and privilege of making and vending gas, gas lights or gas fixtures, and any substance or material that might then or thereafter be used as a substitute therefor, without annexing to such right any condition that such substitute should be only such as was known to art at the date of the approval of said act.

And it further appears from the terms of said Act of March 26th, 1868, by which said Act of March 2d, 1857, was amended as set forth in relator's petition, that all the rights, privileges and franchises granted to said relator by said fifth section as said Act of March 2d, 1857, were by said amendatory Act of March 26th, 1868, confirmed to relator, without annexing to any such right, privilege or franchise any condition that such substitute should be only such as was known to art at the date of the approval of said amendatory act.

HENRY HITCHCOCK,
G. A. FINKELNBURG,
I. H. LIONBERGER,
Attorneys for said Relator.

ISSUES.

The issues thus presented are as follows:

Relator claims to be a body politic by virtue of an Act of the General Assembly of Missouri, approved March 2d, 1857 (Acts 1856-7, p. 598), as amended by an act approved March 3d, 1857 (Acts 1856-7, p. 599), as amended by an act approved March 26th, 1868 (Acts 1868, p. 187).

Analyzed said acts are as follows:

ACT MARCH 2D, 1857.

The first section of the act creates Jas. M. Hughes and seven others a body politic and corporate by the style of "The Laclede Gas Light Company, and by that name they and their successors and assigns shall have perpetual succession, etc."

The second section fixed the capital stock at fifty thousand dollars and authorized it to be increased to two millions.

The third section directs that the affairs of the company shall be managed by a board of not less than five directors, etc.

The fourth section authorized books of subscription for the capital stock to be opened in St. Louis, and upon the sum of fifty thousand dollars being subscribed provides that the company may organize under this charter.

Section 5 of the act is as follows:

"The said company, its successors and assigns shall, within all that portion of the present corporate limits of the City of St. Louis, in St. Louis County, not embraced within the corporate limits of said city, as established by the act entitled 'An act

to incorporate the City of St. Louis,' approved February 8th, 1839 (the corporate limits of the city being by the Act of 1839 bounded as follows: Beginning at a point in the Mississippi river, due east to the southeast corner of St. George in St. Louis County, thence due west to the west line of Second Carondelet avenue; thence north with the west line of said avenue to the north line of Chouteau avenue; thence northwardly in a direct line to the mouth of Stony creek above the present north line of the City of St. Louis; thence due east to the middle of the main channel of the Mississippi river,) *have and enjoy, during the continuance of this act, the sole and exclusive privilege and right of lighting the same, and of making and vending gas, gas lights, gas fixtures, and of any substance or material that may now or hereafter be used as a substitute therefor*, and to that end may establish and lay down, in said portion of said corporate limits, all pipes, fixtures or other thing properly required, in order to do the same, (the same to be done with as much dispatch and as little inconvenience to the public as possible), and shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company."

Section six authorized the City of St. Louis and the company to make any contracts that they may deem to their mutual advantage, in regard to the lighting of any parts of said portion of said corporate limits, or any other thing relating to the business and affairs of said company. It provides that "the said city shall have the right, at the expiration of twenty years from the time of the organization

of said company, under this charter, to purchase all the property and effects of the same, *paying therefor to the same the value of such property and effects, with twenty per cent. added thereto*, such value to be fixed by two appraisers, one to be chosen by the city and the other by the company, and if they cannot agree then the two thus chosen shall name a third man, and a decision of any two of the three shall be binding; and upon such purchase being made all such property and effects, and all rights and privileges granted to said company, shall immediately pass to and vest in said city. If said city fail so to purchase said property and effects, then this charter shall be, and the same is hereby renewed and extended for the further period of thirty years after the expiration hereof."

Section 7 punishes any person or body corporate who interferes with the privileges granted to said company or exercises like acts or privileges, by a forfeit and fine to said company of one thousand dollars for every such offense, and makes each day's continuance of such offense a new offense.

Section eight exempts the company from the operation of Sections 6, 7, 13, 14, 15, 16, and 20 of Art. 1, of "An act concerning corporations," approved November 23d, 1855. The sections of the Act of November 23d, 1855, here referred to are contained in Chap. 34, Rev. Stats. 1855, pp. 371 to 374, and are as follows:

Sec. 6. "If any corporation hereafter created by the legislature shall not organize and commence the transaction of its business within one year from

the date of its incorporation, its corporate powers shall cease."

Sec. 7. "The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal in the discretion of the legislature."

Sec. thirteen makes the individual property of the members of the corporation liable to be taken on execution to double the amount of the debt for all debts of the corporation contracted during ownership of such stock.

Sec. fourteen provides for levying the execution upon the stock.

Sec. fifteen gives the creditor the election of suing stockholders jointly or severally.

Sec. eighteen requires annual notices to be printed of the amount of all existing debts of the corporation, etc.

Sec. twenty prohibits the contracting of debts to an amount exceeding the capital stock.

Sec. nine of the Act of March 2d, 1857, is as follows:

"This act shall take effect from its passage, and shall continue in force for thirty years."

Thus the act by Sec. 1, gives the right to have "*perpetual succession*," and by Sec. 5, to have and enjoy "*during the continuance of this act*" the privileges conferred by the act, and, by Sec. 6, authorized the city to purchase the property at any time within twenty years, and upon failure so to do extends the life of the company "for the further period of thirty years after the expiration hereof."

and *Sec. 9 limits the duration of the corporation to thirty years from the passage of the act.*

The Act of March 3d, 1857, amended the Act of March 2d, 1857, by providing, in Sec. 1 thereof, that the words, "*sole and exclusive*," in the fifth section of the Act of March 2d, be stricken out; and by providing in Sec. 2, of the amendatory act, that in case the city purchased the property as provided in Sec. 6 of the Act of March 2d, it should not be required to pay any more than the *appraised value* of the property and effects to the Laclede Gas Light Company, *and struck out the additional percentage of twenty per cent. provided for in said Sec. 6.*

The Act of March 26th, 1868, is entitled: "An act to amend an act to incorporate the Laclede Gas Light Company, approved March 2d, 1857," and provides as follows:

Section one provides that: "The said Laclede Gas Light Company shall and may, within the corporate limits of the City of St. Louis, as the same are now or may hereafter be established, exercise, have, hold and enjoy *forever* all the rights, privileges and franchises GRANTED TO IT BY THE FIFTH SECTION OF THE ACT TO WHICH THIS ACT IS AMENDATORY, and may, at any time, lease, sell, or dispose of any portion of said rights, privileges and franchises, to individuals, associations, or corporations intending or desiring to exercise the same within any portion of the limits aforesaid."

Sec. 2 authorizes *the capital stock of the company to be increased, from time to time, to such amount as may be necessary to cary on its business.*

Section 3 provides that nothing in said act shall

be construed as affecting the vested rights of the St. Louis Gas Light Company, "AND THE SIXTH SECTION OF THE SAID ACT, TO WHICH THIS ACT IS AMENDATORY IS HEREBY REPEALED."

Sec. 4 is as follows:

"An act entitled 'An act supplementary to and amendatory of an act entitled an act to incorporate the Laclede Gas Light Company, approved March 3d, 1857,' is hereby repealed."

Sec. 5 provides that the act shall take effect from its passage.

If all of these acts are legal and constitutional then the charter of the Laclede Gas Light Company will be as follows:

Sec. 1. James M. Hughes, Edward Bredell, Robert Holmes, John C. Rust, Charles Gibson, Samuel H. Gardiner, Henry A. Clover and Archibald Gamble, be, and they are, created and constituted a body politic and corporate, by the style of the Laclede Gas Light Company and by that name, they and their successors and asssigns *shall have perpetual succession*, may contract and be contracted with, sue and be sued, and may also hold and convey, or otherwise manage and dispose of such property, real, personal and mixed, as may be necessary for the purposes of said corporation, and the prosecution of its legitimate business.

Sec. 2. The capital stock of said company shall be fifty thousand dollars and may be increased, from time to time, to such amount as may be necessary to carry on its business.

Sec. 3. The affairs of said company shall be conducted by a board of not less than five directors,

and such officers and agents as they may deem necessary; said directors to be chosen annually, by the stockholders, each share of stock being entitled to one vote in such election, and they shall hold their office for one year, and until their successors are elected and qualified; said directors shall have power to ordain and make all needful by-laws, rules and regulations for the transaction of the business of said company, and under the direction of the stockholders, may have absolute power over all property and effects of said company. They may also fill vacancies in their board until the next regular election.

Sec. 4. The said corporators, or a majority of them, may, at any time, open books, in the City of St. Louis, for subscription to the capital stock of said company, and upon the sum of fifty thousand dollars being subscribed may organize said company under this charter.

Sec 5. The said Laclede Gas Light Company shall and may, within the corporate limits of the City of St. Louis, as the same are now or may hereafter be established, exercise, have, hold and enjoy forever the sole and exclusive privilege and right of lighting the same, and of making and vending gas, gas lights, gas fixtures, and of any substance or material that may be now or hereafter used as a substitute therefor; and to that end may establish and lay down, in said portion of said corporate limits, all pipes, fixtures, or other thing properly required, in order to do the same (the same to be done with as much dispatch and as little inconvenience to the public as possible); and shall also have all other

powers necessary to execute and carry out the privileges and powers hereby granted to said company; and may at any time, sell, lease, or dispose of any portion of said rights, privileges and franchises to individuals, associations, or corporations intending or desiring to exercise the same within any portion of the limits aforesaid.

Sec. 6. Nothing in this act contained shall be construed as affecting the vested rights of the St. Louis Gas Light Company.

Sec. 7. Any person or body corporate who shall, within the corporate limits, interfere with the privileges hereby granted to said company, or exercise like acts or privileges, shall, for every such offense, forfeit and pay to said company one thousand dollars, and each day's continuance of such offense shall be construed to be, and be, a new offense, under this section.

Sec. 8. The said company and this act is hereby exempted from the operation of Sections 6, 7, 13, 14, 15, 18 and 20, of Art. 1 of an act entitled: "An act concerning corporations," approved November 23d, 1855.

Sec. 9. This act shall take effect from its passage and shall continue in force for thirty years.

Thus by section 1 the Laclede Gas Light Company, their successors and assigns, are given "*perpetual succession.*"

By section 5 said company is given the sole and exclusive right to exercise, have, hold and enjoy "*forever*" the privilege and right of lighting the city, and of making and vending gas, gas lights, gas fixtures, and of any substance or material that may be

now or hereafter used as a substitute therefor, subject, however, to the vested rights of the St. Louis Gas Light Company.

By section 9 it is provided that the act "*shall continue in force for thirty years.*"

Relator's Claims.

Relator, after setting forth the acts hereinbefore referred to, states: That on the 28th of February, 1873, a certain agreement known as the "Tripartite Agreement," was made between the City of St. Louis, the St. Louis Gas Light Company and the Laclede Gas Light Company, by which, for certain valuable considerations therein set forth, the Laclede Gas Light Company abandoned and surrendered any and all exclusive rights and all claims or pretense of claims of sole or exclusive privileges or right whatsoever under its charter; that relator has been engaged for a long time in the lighting business, both by gas and electricity, and under a contract with the City of St. Louis it is now lighting a part of the streets and alleys by electricity, and is also furnishing light by means of gas or electricity to many thousand private consumers; that it has erected and maintains extensive and costly plants for the manufacture and distribution of gas as well as genating and distributing electric currents, the former being distributed by means of a system of pipes laid under ground along the streets of the City of St. Louis, said city never having objected to its so doing, and the latter being distributed by overhead wires strung upon poles along the streets and alleys of the city, and, transmitted in this way, such electric-

ity is, if accidentally diverted, dangerous to human life and property; that in order to avoid such inconvenience and danger to the public, relator had made arrangements to lay its wires under ground according to plans prepared by it; that respondent, as street commissioner of the City of St. Louis, under the charter of said city, has control of the streets and alleys of the city; that relator, after giving notice of intention so to do, on the 30th of October, 1894, began making an excavation at a point on Broadway, near the corner of Mound street, for the purpose of placing such electric wires under ground, when it was stopped by order of respondent, who notified relator he would not permit it to make any excavation for any purpose whatever, without a permit previously obtained for that purpose; that Sec. 568, Art. 1, Chap. 15, Rev. Ord. 1887, of the city, provides that "no person shall make or cause to be made any excavation on any public street, highway, or alleys without permission of the street commissioner so to do, excepting public work done under the authority of the water or sewer commissioner, who, at the time of ordering any such excavation, shall notify the street commissioner of the same;" that thereafter relator applied to the street commissioner for a permit to lay its wires underground for the purpose aforesaid, but the street commissioner refused to grant the permit.

RESPONDENT'S CLAIMS.

The return of respondent sets up the following defenses, to-wit:

First. That the Act of March 26th, 1868, is un-

constitutional, null and void, and is in conflict with Par. 2, of Sec. 1, of Art. 8 of the Constitution of Missouri, 1865, which provides as follows: "No law shall be passed reviving or re-enacting any act heretofore passed, creating any private corporation, where such corporation shall not have been organized and commenced the transaction of its business within one year from the time such act took effect, or within such other time as may have been prescribed in such act for such organization and the commencement of business;" that the Laclede Gas Light Company did not organize and commence business within one year after March 2d, 1857, but, on the contrary, did not commence business until the year 1873.

Second. That the Act of March 26th, 1868, is null and void and in conflict with Sec. 25 of Art. 4 of the Constitution of Missouri, 1865, which section is as follows: "No act shall be revived or re-enacted by mere reference to the title thereof; nor shall any act be amended by providing that designated words therein shall be struck out, or that designated words shall be struck out and others inserted in lieu thereof; but in every such case the act revived or renewed, or the act or part of act amended shall be set forth and published at length as if it were an original act or provision."

Respondent showing unto the court in this regard, that the Act of March 26th, 1868, is an act reviving and re-enacting the Act of March 2d, 1857, and that it does not set forth and publish at large the Act of 1857 as revived and re-enacted by the Act of 1868, and that in order to ascertain and de-

termine the meaning of the Act of 1868, it is necessary to compare it with the Act of 1857, and without such comparison it is wholly unintelligible; that the Act of 1868 refers to the rights, privileges and franchises granted by Sec. 5 of the act to which it is amendatory, that is, the Act of March 2d, 1857, and hence it is necessary to refer to the fifth section of the Act of 1857 to determine what rights, privileges and franchises were granted by that section, and that it is, therefore, null and void because it does not set forth and publish at length as if it were an original act or provision, what rights, privileges and franchises were intended to be revived or re-enacted; and that the Act of 1868 further violates said constitutional provision, in that, by Sec. 3 thereof, it attempts to repeal the sixth section of the Act of 1857, without setting forth and publishing the same at length; and that it further violates said constitutional provision, in that it strikes out designated words of the Act of 1857, and inserts others in lieu thereof, to-wit; it strikes out from the fifth section of the Act of 1857 the words "*during the continuance of this act*," and substitutes therefor the word, "*forever*," without setting forth and publishing at length the said amendment as if it were an original act or provision.

Third. The respondent contends that the Act of 1857, whether considered alone or in reference to the Act of 1868, limited the duration of the relator to a term of thirty years, and hence relator's corporate existence ended on the 2d of March, 1887.

Fourth. Respondent contends that even conceding the validity of the Acts of 1857 and 1868, never-

theless relator is not entitled to the relief asked, because, *it has never been granted the right to manufacture, vend or distribute electricity for any purpose whatever, and that electricity is not a substance or material;* that relator has already made excavations in the streets of St. Louis, and, particularly, along the portions thereof for which a permit was asked and refused in this case, and has placed therein pipes and other fixtures for transmitting and vending and supplying gas to consumers in the City of St. Louis.

Fifth. Respondent further contends that by the provisions of Sec. 2721 of Art. 5, Chap. 42, Rev. Stats. 1889, no company is allowed to place its wires or other fixtures under ground in any city, unless it shall first obtain the consent from the city, through the municipal authorities thereof, and that relator has never obtained such consent from the city.

Sixth. Respondent further contends that it is provided by Art. 2, Chapter 15, Rev. Ord. of the City of St. Louis, 1887, as the same has been amended by Ordinance No. 16,894, that no wires, tubes or cables conveying electricity for the production of light, heat or power, shall be placed along, across or under any of the streets, alleys or public places of the city, by any person, corporation or association, who had not previous to the passage of said ordinance accepted and complied with ordinance No. 12,723, unless such person, etc., shall have procured the consent of the city so to do by an ordinance passed by the Municipal Assembly, and then only on condition that such person, etc., before placing its wires, tubes and cables underground, shall

file in the office of the Board of Public Improvements, an application therefor, stating, in detail, the places in the streets to be occupied, the manner of insulating, securing and supporting the wires, tubes, or cables, and procuring from said board a permit therefor, and that relator has never been granted such right by ordinance, nor been granted a permit by said board; that Par. 2 of Sec. 26, Art. 3, of the charter of the City of St. Louis, confers the power upon the Municipal Assembly to pass such ordinance regulations.

Seventh. Respondent further contends that lighting by electricity was wholly unknown to art on the 2d of March, 1857, and that by the passage of the act of that date, the General Assembly of Missouri did not, and did not intend to confer upon relator the right to manufacture and vend electricity for lighting purposes.

Eighth. Respondent further contends that it is likewise true that on the 26th of March, 1868, lighting by electricity was wholly unknown to art, and that the General Assembly did not by the act of that date intend to, nor did it, confer upon relator the right to manufacture and vend electricity for lighting purposes.

Relator demurs to the first, second, third and sixth defenses made by respondent, and moves to strike out the fourth, fifth, seventh and eighth defenses made by respondent.

Thereupon the Supreme Court of Missouri, sitting *in banc*, heard the issues so framed and presented,

and after duly considering the same rendered the following decision:

In the Supreme Court of Missouri.

In Banc. April Term, 1895.

State *ex rel.* The Laclede Gas Light Company, Relator,
vs.
Michael J. Murphy, Street Commissioner of St Louis, Respondent.

On the petition of relator an alternative writ of *mandamus* was issued by this court, directed to respondent Murphy as street commissioner of the City of St. Louis, commanding him to show cause why he should not be required to issue a permit to relator to make an excavation along the east side of Broadway as near the curb as practicable, and extending from Mound street to Olive street in the City of St. Louis, in so far as such excavation should be necessary for the purpose of laying relator's electric wires under ground.

By its petition relator represents that it is a corporation created under an act of the legislature of the State, approved March 2d, 1857, and a supplementary and amendatory act approved March 3d, 1857, and an amendatory act approved March 26th, 1868.

These acts are set out in full in the petition. The first, approved March 2d, 1857, is entitled "An act to incorporate the Laclede Gas Light Company."

The first section of the act creates James M. Hughes and seven others a body politic and corporate by the style of "The Laclede Gas Light

Company, and by that name they and their successors and assigns are given perpetual succession, etc."

The second section fixed the capital stock at fifty thousand dollars and authorized it to be increased to two millions.

The third section directs that the affairs of the company shall be managed by a board of not less than five directors, etc.

The fourth section authorized books of subscription for the capital stock to be opened in St. Louis, and upon the sum of fifty thousand dollars being subscribed, provides that the company may organize under this charter.

Section five provides that said company, its successors and assigns, should, within the corporate limits of said city, not embraced within the limits as established by Act of 1839, "have and enjoy, during the continuance of this act, the sole and exclusive privilege and right of lighting the same, and of making and vending gas, gas lights, gas fixtures, and of any substance or material that may now or hereafter be used as a substitute therefor, and to that end may establish and lay down, in said portion of said corporate limits, all pipes, fixtures or other thing properly required, in order to do the same (the same to be done with as much dispatch and as little inconvenience to the public as possible), and shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company."

Section six authorized the City of St. Louis and the company to make any contracts that they may

deem to their mutual advantage, in regard to the lighting of any parts of said portion of said corporate limits, or any other thing relating to the business and affairs of said company. It provides that "the said city shall have the right, at the expiration of twenty years from the time of the organization of said company, under this charter, to purchase all the property and effects of the same, paying therefor to the same the value of such property and effects, with twenty per cent. added thereto, and the manner of ascertaining the value by appraisers is provided. Said section has this further provision: "If said city so fail to purchase said property and effects, then this charter shall be and the same is hereby renewed and extended for the further period of thirty years after the expiration thereof."

Section seven punishes any person or body corporate who interferes with the privileges granted to said company or exercises like acts or privileges, by a forfeit and fine to said company of one thousand dollars for every such offense, and makes each day's continuance of such offense a new offense.

Section eight exempts the company from the operation of sections 6, 7, 13, 14, 15, 16 and 20 of Art. 1 of "An act concerning corporations," approved November 23d, 1855. The sections of the Act of November 23d, 1855, here referred to are contained in Chap. 34, Rev. Stats. 1855, pp. 371 to 374.

Section nine is as follows: "This act shall take effect from its passage, and shall continue in force for thirty years."

The Act of March 3d, 1857, is as follows:

"An act supplementary and amendatory of an

act entitled 'An act to incorporate the Laclede Gas Light Company.'

Be it enacted by the General Assembly of the State of Missouri, as follows:

Sec. 1. The act to which this act is amendatory is hereby amended so that the words 'sole and exclusive' in the fifth section of the act are stricken out.

Sec. 2. The City of St. Louis shall not be compelled, in any purchase which it may make under the sixth section of the before recited act, to pay more than the appraised value of the property and effects of the corporation created by said act, without any addition of percentage.

This act to take effect and be in force from and after its passage."

The Act of March 26, 1868, was entitled "An act to amend an act to incorporate the Laclede Gas Light Company," approved March 2, 1857, and is as follows:

Section 1. The Laclede Gas Light Company shall and may, within the corporate limits of the City of St. Louis, as the same are now or may hereafter be established, exercise, have, hold, and enjoy forever, all the rights, privileges and franchises granted to it by the fifth section of the act to which this act is amendatory, and may at any time lease, sell or dispose of any portion of said rights, privileges and franchises to individuals, associations or corporations, intending or desiring to exercise the same within any portion of the limits aforesaid.

Sec. 2. The capital stock of said company may

be increased from time to time to such amount as may be necessary to carry on its business.

Sec. 3. Nothing in this act contained shall be construed as affecting the vested rights of the St. Louis Gas Light Company; and the sixth section of said act to which this act is amendatory, is hereby repealed.

Sec. 4. An act entitled "An act supplementary to and amendatory of an act entitled 'An act to incorporate the Laclede Gas Light Company,'" approved March 3, 1857, is hereby repealed.

Sec. 5. This act shall take effect from its passage.

Relator represents further that under the charter rights granted by these general acts it is, and, for a long time has been, engaged in the lighting business, both by gas and electricity; that under a contract with the City of St. Louis, it is lighting a part of its public streets by electricity; that it is furnishing light by means of gas or electricity to many thousand private consumers in said city, being a large part of the inhabitants thereof; that in order to fulfill its obligations to the city and the public under its charter, it has erected and maintains extensive and costly plants for the manufacture and distribution of gas as well as for generating and distributing electric currents; that for distributing gas it has from time to time constructed and maintained and now maintains a system of pipes laid under ground along the streets of the City of St. Louis as it was at all times authorized to do by its said charter, nor has the City of St. Louis ever objected to its so doing or disputed relator's right to do so; that for the distribution of electricity rela-

tor has hitherto used overhead wires strung upon poles along the streets and alleys of said city, which poles and electric wires have been and are maintained and used by relator without objection by said city or the authorities thereof, for the distribution of electricity as well to furnish light to private consumers as for the fulfillment by relator of its said contract with said City of St. Louis for the lighting by electricity of certain public streets and alleys thereof; that to effect such distribution it is necessary to transmit through and by means of said wires electric currents of great power, which, if and when accidentally diverted are dangerous to human life and property; that in order to avoid the increasing inconvenience and danger to the public necessarily incident to that method of disturbing electric currents, and in order to provide more effective and proper service, relator has made arrangements to lay its wires under ground along and under the street of said city according to approved and practicable plans and is now ready to do so with as much dispatch and as little inconvenience to the public as possible.

Relator states further that respondent was street commissioner of said city, and under its charter and ordinances had supervision and control of its streets and the enforcement of ordinances relating thereto. That after notice to said commissioner of its intention to do so, on the 30th day of October, 1894, the relator commenced excavating on said streets for the purpose of laying its electric wires under ground, but was prevented from so doing by respondent acting in his capacity of street commissioner. That

thereupon relator applied to respondent for a permit to make such excavation for such purposes, which was denied him.

Respondent made return to said writ and by affirmative averments put in issue the rights claimed by relator, and set up the provisions of certain city ordinances regulating the use of electric wires on the streets of the city and averred a non-compliance with the requirements of such ordinances. By demurrer to parts of the return and motion to strike out other parts the following issues of law were fairly framed:

First. Is the Act of March 26th, 1868, unconstitutional as being in conflict with section 2, article 8 of the Constitution of Missouri of 1865?

Second. Is said act void as being in conflict with section 25 of article 4 of said constitution?

Third. Did the charter of relator expire by limitation at the end of thirty years from the date of the Act of March 2d, 1857.

Fourth. Do the powers granted relator include the right to manufacture, sell or distribute electricity for lighting purposes?

Fifth. Has relator the right, under its charter, to place its wires under ground without the assent of the municipal authorities and without compliance with the requirements of the valid ordinances of the city?

I. The object to be accomplished by the writ is to require Murphy, as street commissioner, of the City of St. Louis, to issue to relator a permit to make such excavation on one of the public streets of the city as may be necessary for the purpose of

laying its electric wires under ground. The constitutionality of the acts under which relator claims corporate existence, is put in issue by the answer of respondent and demurrer thereto. Respondent also charged that though the acts of incorporation were valid, in the first instance, the life of the corporation itself has expired by limitation of its existence as fixed by the charter and general laws of the State.

The city is not made a party to this proceeding and we do not deem it necessarry in this case to pass upon any questions that do not directly concern the duties of the street commissioner. We will not therefore consider, or express an opinion upon, any question involving the right of relator to exercise the rights, or enjoy the franchises which appear to have been granted under the acts of the General Assembly mentioned in the statement.

For the purpose of discussing the other questions involved we will then assume, without deciding, or intimating an opinion, that relator is an existing corporation possessing all the powers, rights and privileges its charter purports to confer upon it.

It is insisted by relator that under its charter it acquired from the State a vested right to the use of the streets of the City of St. Louis under which to lay its pipes for the transmission of gas or any other "substance or material" that might thereafter be adopted for illuminating purposes, and that such right was beyond the control of the municipal authorities; that electricity is a substance and material within the meaning of the charter, and therefore it has a vested right to lay its wires beneath the sur-

face of the streets for the purpose of conducting electricity through the city for illuminating purposes, and that this right cannot be interfered with unreasonably by the city.

With the views we take of this question we do not think it necessary to inquire whether the right to use electricity for making light was included under the terms "substance or material" as used in the charter. It appears that relator has, for a number of years, under contracts with the city, been lighting its streets by electricity conducted by wires strung above the surface of the streets, and other questions besides the abstract right to do so would be involved in such injury. We will therefore confine our inquiry to the question whether relator has a vested right to place its electric wires under the surface of the streets without the assent of the municipal authorities thereof and without compliance with valid ordinances of the city.

Generally speaking, it is true, the legislature has supreme control of the streets of the cities. It is also true that it may, and generally does, delegate to municipal corporations such measure thereof as it deems best. The control thus delegated may be exercised by the municipal authorities.

Subsequent to the Act of 1868, under authority of the constitution of 1875, the City of St. Louis adopted a charter whereby the State delegated to it the power to regulate the use of its streets, and the power to pass all ordinances, not inconsistent with the provisions of the charter, or the laws of the State, as may be expedient, in maintaining the

peace, good government, health and welfare of the city, its trade, commerce and manufactures.

In pursuance of these powers the city enacted certain ordinances regulating and restricting the use of electric wires in the city and requiring the assent of the Board of Public Improvement in respect to the manner in which electric wires, tubes and cables, should be secured or supported and insulated. It is charged in the return and admitted by the demurrer that relator had never complied with the requirement of this ordinance. Relator insists that the provisions of the ordinance cannot apply to rights secured to it by the State long prior to the date of the charter.

It is the well settled present policy of the law of this State to delegate to municipal corporations not only general police powers, but the control of their streets in respect to the use thereof for public purposes other than that of ordinary travel by pedestrians and private vehicles. Thus the constitution prohibits the legislature from granting the right to construct and operate street railways within any town or village without first acquiring the consent of the local authorities having control of the streets. (Sec. 20 Art. 12, Const. of Mo.)

Again, the statute requires telegraph and telephone companies to obtain the consent of the city, through its municipal authorities, before they can exercise their right to lay their wires, and other fixtures, under ground in any of its streets. (R. S. 1889, Sec. 2721.)

Electric wires when charged are recognized as being dangerous to life and property, and their use

is therefore subject to police regulations. (W. U. Telegraph Company v. Philadelphia, 21 Am. & Eng. Corp. Cas. 40 and note; Dill. Munic. Corp., Sec. 698.)

The State cannot limit its exercise of the police power by contract or in any other way. It was said by Chief Justice Waite: "All agree that the legislature cannot bargain away the police power of the State. Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police. (Stone v. Mississippi, 101 U. S. 817. See Boyd v. Alabama, 94 U. S. 645; Metropolitan Bd. v. Barrie, 34 N. Y. 657; Railroad v. Mayor of Baltimore, 77 Maryland, 381.)

Dillon says: "The citizen owns his property absolutely, it is true; it cannot be taken from him for any private use whatever, without his consent, nor can it be taken for any public use without compensation; still he owns it subject to this restriction, namely, that it must be so used as not to unreasonably injure others, and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors or the citizens generally." (Dill. Munic. Corp.)

The grant by the State to relator, though construed to include the right to use electricity for illuminating purposes in respect to such right, was taken subject to reasonable regulations as to its use,

and the power to regulate has been delegated to the City of St. Louis.

Under its general police power the city has the right to require compliance with reasonable regulations as a condition to using its streets by electric wires.

II. But this is not the only reason why the city should not, under its special power to regulate the use of its streets and under its general police power, have the right to supervise and regulate the manner in which electric wires of relator and all others should be placed and used in the public streets.

The art of producing light by electricity was wholly unknown to science at the time the franchise was granted to relator. The legislature, having no knowledge of the use that would be made of the streets in applying new discoveries in producing light, could not have intended to grant rights and powers inconsistent with their ordinary use. It would be most unwarrantable to imply, not only that relator had the right under the general words used in the act of incorporation to use electricity for lighting purposes, but that it also had the right to adopt its own methods for exercising that power, regardless of the paramount rights of the public to the use of the streets.

The powers delegated to the city to regulate the use of its streets existed before the art of lighting by electricity was known, or at least before relator adopted it, and the art should be exercised, if at all, under the powers thus in force when it was brought into use.

The following declaration of law was quoted approvingly in Carroll v. Campbell (108 Mo. 559): "It is a well settled rule of construction of grants by the legislature to corporations whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the object of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public." (Fanning v. Gregoire, 16 How. 534.)

There seems to me much stronger reason for applying this rule to the manner in which a right conferred shall be exercised when more than one method is open, and when the rights and safety of the public are more or less affected by either. In such case where the public streets of a city, which are under municipal control, are to be used, it seems too plain for argument that the city should have the right to direct the manner in which the use should be exercised.

Again, it is a matter of common knowledge that electricity is used for the purposes of transmitting sound by telephone, for transmitting messages by telegraph, for generating light, and for producing power. These uses are regarded as public and have become necessary to the business and convenience of the country, and particularly that transacted in large cities. Overhead electric wires in some streets are numerous. These contribute very materially to public convenience and private business, but when not properly supervised

and regulated endanger the lives and property of the public. If used, as they generally are, in the public streets, public safety requires that they should be under police regulation and municipal control.

It is a matter also of public notoriety that the question is now being considered whether it would not be necessary, in the interest of public safety, as well as convenience, that these wires should be placed under ground, so as thereby to leave the streets safe and unobstructed

As a police regulation, we have no doubt, the municipal authorities would have the right to require this to be done in case no vested rights were infringed. Many corporations and companies doubtless now use electric wires for the various purposes above mentioned. It cannot be said, not having the various charters before us, that one of these possesses rights superior to those of any others. To accommodate them all, to prevent monopolies, and to regulate the use of the streets, it seems absolutely necessary that the municipal authorities should have the right to direct the manner in which wire shall be placed under ground. Without such regulation, relator, or any other corporation using electric wires, could place them under ground in such a manner as to practically exclude all others. Moreover, relator, as one of its important franchises, asserts the power to sell, lease or dispose of any portion of said rights, privileges and franchises to individuals, associations or corporations, intending or desiring to exercise the same within any portion of the limits named. Thus under its charter, al-

lowing the rights herein claimed, it could practically control the use of the streets in respect to laying electric wires under ground, and exclude the city from one of the most important of its municipal powers. The legislatare could never have contemplated such a result.

By giving the city the right to regulate the laying of electric wires under ground, relator is deprived of no vested right. If its charter gives it the right to use electricity for lighting purposes it can do so, as we understand from the petition it has been doing, in the method now in use in said city. If the city should determine that public safety requires these wires to be placed under ground, and provides the manner in which it shall be done, and relator believes its rights are thereby infringed, it will then be time enough to complain.

As the case is now presented we must hold that the city, under its power to regulate the use of streets, and under its general police power, has the right to require a compliance with regulations which either wholly prohibit relator from laying its wires under the streets or which regulate the manner in which it may be done.

Respondent, under his official duties as street commissioner, properly refused to grant the permit demanded, unless relator first complied with the requirements of the valid ordinances then in force.

Peremptory writ denied.

All the judges concur.

G. B. MACFARLANE,
Judge.

Afterwards, on the 21st of June, 1895, plaintiff in error filed the following motion to modify the judgment of the Supreme Court aforesaid:

MOTION TO MODIFY.

IN THE SUPREME COURT OF MISSOURI, APRIL TERM, 1895.

State of Missouri at the Relation of the Laclede Gas Light Company, Relator,	No. 7434.
vs.	
Michael J. Murphy, Street Commissioner of the City of St. Louis, Respondent.	Court *in Banc.*

Now comes relator and moves the court to modify the judgment heretofore entered in this cause, to-wit, on the 18th day of June, 1895, so as to allow relator to plead or to traverse respondent's return in accordance with the usual practice in cases of *mandamus*, and as provided by the statutes of Missouri applicable thereto.

And for grounds of this motion relator says that the argument and decision were upon a demurrer to parts of the return and a motion to strike out other parts thereof; that the effect of the decision rendered by this court on the 18th day of June, 1895, is to overrule the demurrer as well as the motion and to leave to relator the alternative right of letting judgment go upon the pleadings as they stand or to plead over; but relator desires to plead over before a final judgment is entered, for the reason that relator wishes to set out in full the city ordinances referred to in respondent's return, which have not

been set out in the pleadings as they now stand, and also for the reason that by the demurrer relator constructively admits certain allegations of fact which it desires to deny, so that if relator should determine to sue out a writ of error from the United States Supreme Court it may have the benefit of a complete and proper record in the cause.

Because, reference being had to the state of the pleadings in said cause, and to the statutes in such case provided, relator respectfully suggests to the court that the said final judgment rendered on the 18th day of June was prematurely and improvidently rendered.

THE LACLEDE GAS LIGHT COMPANY,
Relator,
BY HENRY HITCHCOCK,
G. A. FINKELNBURG,
I. H. LIONBERGER,
Its Attorneys.

Afterwards, on the 25th of June, 1895, the following order was made in the case:

STATE EX REL. LACLEDE GAS LIGHT COMPANY,
Relator,
vs.
M. J. MURPHY, STREET COMMISSIONER, ETC.,
Respondent.

Now at this day, the court having fully considered and understood the motion heretofore filed to modify the judgment heretofore entered herein and to allow the relator to plead to the return herein, doth order that the judgment entered herein on the

18th day of June, 1895, be, and the same is hereby, set aside; that the demurrer to the return and motion to strike out parts thereof are overruled, and that leave is granted relator to plead to the return within five days from June 25th, 1895, and this cause is continued.

Thereafter, on the 28th of June, 1895, relator pleaded to the return as follows:

IN THE SUPREME COURT OF MISSOURI, APRIL TERM, 1895.

State ex rel. Laclede Gas Light Company, Relator,
vs.
M. J. Murphy, Street Commissioner, Respondent.
} No. 7434.

Now comes said relator, by its attorney of record, and, by leave of court first obtained therefor, for its plea to the return of said respondent in the above entitled cause, says:

That it, said relator, is advised, and therefore avers, that the said act approved March 26, 1868, is not unconstitutional, null, or void, and is not in conflict with any provision contained in article VIII of the Constitution of Missouri, 1865.

Relator avers that said Act of March 26, 1868, was and is a valid amendment of the act approved March 2, 1857, mentioned in said respondent's return, by which relator was incorporated, and in virtue of its said charter as amended by said Act of March 26, 1868, relator is vested with and entitled

to hold and enjoy all the corporate franchises, rights, and powers thereby granted.

Relator further shows the court that by section 8 of said Act of March 2, 1857, it was provided that the said Laclede Gas Light Company and the said act incorporating the same were and should be exempted from the operation of sections (6) six, (7) seven, (13) thirteen, (14) fourteen, (15) fifteen, (18) eighteen, and (20) twenty of article I of the act entitled "An act concerning corporations," approved November 23, 1855.

Relator states that section 6 of said Act of November 23, 1855, was in the words and figures following, to-wit:

"Section 6. If any corporation hereafter created by the legislature shall not organize and commence the transaction of its business within one year from the date of its incorporation its corporate powers shall cease."

And section 7 of said Act of November 23, 1855, was in the words and figures following, to-wit:

"Section 7. The charter of every corporation that shall hereafter be granted by the legislature, shall be subject to suspension, alteration and repeal in the discretion of the legislature."

Relator is advised and avers that being so exempted, to-wit: by section 8 of said Act of November 23, 1855, said corporation was not required to organize nor to commence business within one year from the date of its incorporation, nor was any time prescribed in its charter, to-wit: said Act of March 2, 1857, or in said amendatory act of March 26, 1868, for such organization and commencement

of business; and relator further shows the court that by reason of the provision in section 8 of said Act of March 2, 1857, also exempting said corporation from the operation of said section 7 of said Act of November 23. 1855, relator's said charter became and was a contract between the State of Missouri and the said corporation, which was not nor is subject to alteration, suspension, or repeal by said State of Missouri or by any legislative act or provision of the constitution thereof subsequently adopted except with the consent of said corporation, and that in virtue of the provisions contained in its said charter, to-wit, said Act of March 2, 1857, and especially in sections 1 and 4 thereof, the corporators and stockholders of said corporation had the right under said charter to organize said corporation and to commence the transaction of its business at any time after the said Act of March 2, 1857, took effect, without reference to the provisions of said Act of November 23, 1855, and without reference to any act of the General Assembly or any provision of the constitution of said State which might thereafter be enacted or adopted. Relator further avers that prior to the passage of said Act of March 2, 1857, the St. Louis Gas Light Company was incorporated by an act of the General Assembly of the State of Missouri, approved February 4, 1837, entitled "An act to incorporate the St. Louis Gas Light Company," and that said act was amended by an act of the General Assembly, approved February 11, 1839, entitled "An act to amend the charter of the St. Louis Gas Light Company."

That by the charter of said St. Louis Gas Light

Company as amended said company had the sole and exclusive privilege and right of vending gas lights in the City of St. Louis and its suburbs for a period of twenty-five years from and after the first day of January, 1840, and in the event that the City of St. Louis did not resolve to purchase its property for a further period of twenty-five years or until the first of January, 1890.

That on said 2d day of March, 1857, and for many years thereafter and until the year 1873 said charter of the St. Louis Gas Light Company was in full force and effect, and relator was thereby precluded from selling gas and gas light in said city, without the consent of said St. Louis Gas Light Company, which consent was not obtained until the year 1873, and therefore relator did not begin to manufacture and sell gas until said year 1873.

Wherefore relator says that the several averments in said respondent's return contained in respect of the time when, as alleged, it, said relator, organized as a corporation and in respect of the time when it commenced the transaction of business constitute no defense to this proceeding.

Relator denies that it, said relator, did not organize as a corporation within one year from the time when said Act of March 2d, 1857, took effect. On the contrary relator avers that within one year from the time said Act of March 2d, 1857, took effect and during the year 1857 the persons named as corporators in said act held a meeting in the City of St. Louis, Missouri, for the purpose of accepting said charter and organizing said company under said act; that all the corporators named in said act were

present at said meeting, and the said corporators then and there, to-wit, in said City of St. Louis, did accept said charter and open books for subscriptions to the capital stock of said company and the sum of ($50,000) fifty thousand dollars was then and there, to-wit, by said corporators and others, subscribed for the stock of said corporation, being the entire amount of the capital stock of said corporation authorized by said act, and the said subscribers and stockholders did thereupon, to-wit, at said meeting, organize said company by electing five directors of said corporation from among said stockholders thereof; also electing a president and secretary of said corporation from among said directors; and relator denies that the said corporation did not commence business until the year 1873, and, on the contrary, avers that it commenced business long before the year 1873.

Relator further avers that said Act of March 26th, 1868, is not null or void nor is in conflict with any provision contained in article 4, section 25, of the constitution of Missouri, 1865, as in said return alleged; that said Act of March 26th, 1868, is not an act reviving an Act of March 2d, 1857, nor is an act re-enacting said Act of March 2d, 1857, nor does said act of March 26th, 1868, revive or re-enact or purport to revive or re-enact said Act of March 2d, 1857, by mere reference to the title thereof, nor does said Act of March 26th, 1868, amend or purport to amend said Act of March 2d, 1857, by providing that said designated words thereof shall be struck out or that designated words shall be struck out and others inserted in lieu thereof.

Wherefore relator says that the several averments in said respondent's return setting forth the grounds upon which, as alleged, the said Act of March 26, 1868, violates section 25 of article IV of the Constitution of Missouri, 1865, and is therefore null and void, are and each of them is immaterial and irrelevant and constitutes no defense to this proceeding, and denies each and every one thereof.

Relator denies that by the terms of section 9 of the said Act of March 2, 1857, the charter of relator expired on the 2d of March, 1887, as in said return alleged; and relator avers that although, as hereinbefore stated, the said Laclede Gas Light Company was duly organized as a corporation in and during the year 1857 in pursuance of the provisions of said Act of March 2, 1857, the said City of St. Louis did not at the expiration of twenty years from the time of the organization of said company nor at any time purchase or offer to purchase the property and effects of said company or any part thereof.

Relator is advised and avers that even if the averment in respondent's return, to-wit, that electricity is not a substance or material, were true, which relator denies, said averment is irrelevant and immaterial and constitutes no defense to this proceeding, and further shows to the court—

That the object for which relator was incorporated, as set forth in said Act of March 2, 1857, and referred to in said Act of March 26, 1868, amendatory thereof, was to carry on the business of lighting the City of St. Louis, as well the public streets and alleys of said city as the private and public buildings thereof; that by said charter was granted to relator

the right and privilege of lighting the said city and of making and vending gas, gas lights, gas fixtures, and any substance or material that might at the date of said charter, to-wit, on March 2, 1857, or at any time thereafter, be used as a substitute therefor, and to that end relator was expressly empowered to establish and lay down in any part of the corporate limits of said city as then or thereafter established, all pipes, fixtures, or other thing properly required to do the same; the same to be done with as much dispatch and as little inconvenience to the public as possible.

That for the purpose of lighting a city or to illuminate any space therein, whether a public street or alley or a building or any portion thereof, it is necessary to produce artificial light in the space to be illuminated; that artificial light is produced by making incandescent—that is to say, by bringing to a condition of white heat, in which it gives out light—any substance or material capable of being so used; that in order to light said city as aforesaid relator was expressly authorized by its charter to make and vend not only illuminating gas, but any substance or material which might then or thereafter be used as a substitute therefor, and to that end to establish and lay down at any point within the corporate limits of said city all pipes, fixtures, or other thing properly required to do the same; that illuminating gas is a highly inflammable compound of carbon and hydrogen, chemically combined in certain fixed proportions; that in order to use said gas for illuminating purposes it must be set on fire, which decomposes said gas, setting free the

carbon therein in the form of fine particles and rendering said carbon particles incandescent, which produces what is called gas light.

That light may also be produced from carbon by means of electricity, to-wit: by using carbon not compounded with any other element, in the form of rods or filaments, which may be and are brought to a condition of incandescence by transmitting into or through said carbon rods or filaments what is called electricity by means of apparatus suitable therefor, the result being that the carbon thus rendered incandescent gives out what is called electric light, which has greater illuminating power than gas light and is commonly used as a substitute therefor, as well for the illumination of public streets and places as of public and private buildings, in many cities throughout the United States.

That the right and privilege of lighting the City of St. Louis as aforesaid granted by its charter to relator includes the production of light in the manner last above described, to-wit, by making carbon or any other suitable substance incandescent by means of electricity, equally with the right or privilege of making and using carbon in its compound form of illuminating gas and by making it incandescent in the manner above stated, to-wit, by the application of heat, carbon being in either case the substance or material which is made incandescent, thereby producing light, though when illuminating gas is used the carbon is in a compound form, the particles thereof being set free and made incandescent by heat, as above stated, producing what is called gas light while in the production of electric

light pure carbon is used as a substitute for gas and is made incandescent by the application of electricity.

It is true, as in said return alleged, that relator, therein exercising its corporate franchise of lighting the City of St Louis and of vending gas and gas light, has heretofore established, placed and laid down certain pipes and fixtures beneath the surface of the street on the east side of Broadway from Mound street to Olive street and at divers and sundry other places beneath the surface of the streets of said City of St. Louis for supplying gas to its consumers and by means thereof relator has during more than ten (10) years last past carried on and still carries on its business as a lighting company, of all which said city, and the municipal authorities thereof had notice and have at all times acquiesced therein.

It is also true, that in order to produce or furnish light by means of electricity, it is necessary to use wires for conducting the same and to support said wires either on poles above the surface of the streets, as relator is now doing under a contract with the said City of St. Louis, or in tubes or conduits beneath said surface. Relator states that its purpose in making the excavation on Broadway mentioned in said petition was to construct and place under ground a conduit for wires, such conduit and wires being properly required for the production of electric light as a substitute for gas light; that the conduit and wires intended by relator to be so laid down are of the most approved description, such as are used for like purposes in other cities, said conduits

occupying, when completed, a space not exceeding thirty inches in width under the surface of the street, with provision for access thereto at suitable intervals through manholes, properly covered and protected, less than forty inches in width at the surface of the street, the said conduits and manholes, when completed and in use, offering no obstruction whatever to the use of the streets for travel and traffic, and the danger to life and property which attends the use of overhead electric wires, such as relator is now using under contract with said City of St. Louis for the purpose of lighting public streets and alleys therein, being entirely avoided by placing said wires in said conduits.

Relator denies that it has never acquired from the State of Missouri any right to place such wires above or beneath the streets of the City of St. Louis. Relator also denies that it is provided by section 2721 of article 5, chapter 42, Revised Statutes of Missouri, 1889, that no company shall place its wires or other fixtures underground in any city unless it shall first obtain the consent of said city through the municipal authorities thereof. Even if the provisions of said article 5 of chapter 42 of the Revised Statutes of Missouri, 1889, or of said section 2721, referred to by respondent, purported to relate or apply to this relator, such provisions would be invalid as impairing the obligation of the contract contained in relator's charter; but relator states that said article 5 of chapter 42 of the Revised Statutes of 1889 is a part of the general corporation law of this State, and that said section 2721 in terms applies exclusively to companies organized under the provisions of said

article 5 for the purpose of constructing and maintaining telephone or magnetic telegraph lines and to no other corporations or class of corporations.

Relator admits that by article 2, chapter 15, Revised Ordinances of the City of St. Louis, 1887, as amended by ordinance No. 16,894, the municipal authorities of said City of St. Louis undertook to prescribe certain conditions for placing wires, tubes, or cables conveying electricity along, across, or under the streets and alleys of said city, but states that the provisions of said ordinance are not fully set forth in respondent's return.

Relator states that the ordinance of the City of St. Louis last above mentioned and in said return referred to as article 2, chapter 15, Revised Ordinance of the City of St. Louis, 1887, as the same has been amended by ordinance No. 16,894, are the same ordinances which were revised and re-enacted by and are contained in article 11 of chapter 15 of the Revised Ordinance of the said City of St. Louis, 1892, to-wit, ordinance No. 17,188, entitled "An ordinance in revision of the ordinances of the City of St. Louis and to establish new ordinance provisions for the government of said city," approved April 7, 1893, said article two, chapter fifteen, being sections 603 to 614, both inclusive, of said revised ordinance No. 17,188; that by said revised ordinance No. 17,188 the Municipal Assembly of the City of St. Louis intended to and did revise and re-enact all ordinances of said city then previously existing in pursuance of section 29 of article 111 of the charter of said city, and that from and after the

17th day of April, 1893, the said sections 603 to 614 of said revised ordinance No. 17,188 were and are the only provisions of any existing ordinance of said city which purported to prescribe any regulations or conditions in respect of the placing by any person or corporation along, across, or under any of the streets, alleys, or public places in said city of any wires, tubes, or cables conveying electricity for the production of light, heat, or power, and that the said sections 603 to 614, inclusive, of said revised ordinance No. 17,188 are the ordinance provisions of said City of St. Louis which are averred in said respondent's return to be legal and binding and valid provisions and to be such as the City of St. Louis had the right to adopt and enact under the charter thereof.

Relator states and shows to the court that the said article 11, chapter 15, Revised Ordinance of the City of St. Louis, 1887, as the same was amended by ordinance No. 16,894 and as now contained in article 11, chapter 15 of the Revised Ordinance 1893, as sections 603 to 614 thereof, both inclusive, are in the words and figures following:

Article 11. Of electric wires, tubes and cables.

Sec. 603. Conditions of placing wires, etc. That no wires, tubes or cables conveying electricity for the production of light, heat or power shall hereafter be placed along or across any of the streets, alleys or public places in the City of St. Louis, by any person, corporation or association not having previous to the passage of this ordinance accepted and complied with ordinance number twelve thousand seven hundred twenty-three, now amended, or

shall be duly authorized by the municipal assembly, and then only as hereinafter provided. (Revised Ordinance 1887, Sec. 581, amended.)

Sec. 605. Application and plat to be filed. That any person or persons, corporation or association, duly authorized by ordinance to do business in the City of St. Louis and desiring to place along or across any of the streets, alleys or public places of the City of St. Louis, such wires, tubes or cables, shall file in the office of the Board of Public Improvements an application therefor, stating in detail the streets, alleys or public places which said wires, tubes or cables are to occupy, and the manner in which said wires, tubes or cables are to be secured or supported and insulated, together with a plat showing the route of such wires, tubes or cables. (Revised Ordinance 1887, Sec. 583.)

Sec. 606. Permit may be granted.—The Board of Public Improvements is hereby authorized, upon the filing of the application and plat required by the preceding section, to grant a permit for such occupancy of the streets, alleys and public places herein named, with such restrictions, regulations and qualifications as may be prescribed by said board and under the supervision and to the satisfaction of the supervisor of city lighting. (Revised Ordinance 1887, Sec. 584, amended.)

Sec. 607. Wires, etc., may be placed on telegraph poles, etc., when.—That in case any person or persons, corporation or association, duly authorized by ordinance, desiring to place along or across any of the streets, alleys or public places of the City of St. Louis, such wires, tubes or cables, shall, with the

application and plat heretofore provided for, file in the office of the Board of Public Improvements the written consent of any telegraph or telephone company, or any other electric light or power company, doing business in the City of St. Louis, to the placing of such wires, tubes or cables upon the poles of said telegraph, telephone, electric light or power company, situated in the streets, alleys or public places named in such application, the Board of Public Improvements is hereby authorized to grant a permit for such occupancy of the poles of such telegraph, telephone, electric light or power company, with such restrictions, regulations and qualifications as may be prescribed by said board and under the supervision and to the satisfaction of the supervisor of city lighting. (Revised Ordinance 1887, Sec. 585, amended.)

Sec. 608. Poles to be placed in alleys, when.—That whenever an alley is available for the placing of poles, for the support of such wires, tubes or cables, the Board of Public Improvements will advertise for five days previous to a day set for hearing objections or arguments in favor of placing the said poles in the alley. If, after due consideration, the Board of Public Improvements are of the opinion that the placing of poles for the purposes aforesaid is practicable, such poles shall be placed along said alley instead of along the street named in application. Where the poles are set in any alley they shall be located as near the side lines of the alley as practicable, and in such a manner as not to incommode the public or the adjoining proprietors

or residents. (Revised Ordinance 1887, Sec. 586 amended.)

Sec. 609. Dimensions, construction and location of poles.—The poles used as herein provided shall be of sound timber, not less than five inches in diameter, at the upper end, straight, shapely and of uniform size, neatly planed or shaved, and thoroughly painted with two coats of lead and oil paint, of such color as may be directed by the Board of Public Improvements, and be supplied with iron steps, commencing twelve feet from the surface of the ground and reaching to the arms supporting the wires, tubes or cables; said wires, tubes or cables shall be run at a height not less than twenty-five feet above the grade of the street. Whenever the poles are erected on a street they shall be placed, in all cases, when practicable, on the outer edge of the sidewalk, just inside the curbstone and on the line dividing the lots one from the other, and in no case be so placed as to obstruct the drainage of the streets, or interfere with or damage in any way the curbstones, trees or other public or private property on the line of the street or alley or public place where such pole shall be erected. (Revised Ordinance 1887, Sec. 587.)

Sec. 610. Streets and alleys to be replaced.—Any person or persons, corporation or association having made excavations in the streets, alleys or public places of the City of St. Louis for the purposes aforesaid, shall replace the streets, alleys or public places in such manner and in accordance with such regulations as may from time to time be prescribed by ordinance, or by the Board of Public Improve-

ments, and to the satisfaction of the street commissioners. (Revised Ordinance 1887, Sec. 588.)

Sec. 611. Alterations in location of poles, etc., may be ordered.—The right is hereby reserved to the Board of Public Improvements at any time to direct any alterations in the location of said poles, and also at the height in which the wires, tubes or cables shall run; but before any alteration is made, at least five days' notice in writing shall be given to the person or persons, or the president or the officer in charge of the company affected by the proposed alteration, and reasonable opportunity shall be afforded the representative of such company, or any citizen interested, to be heard in regard thereto. But when any such alteration shall be ordered, the said company shall within five days thereafter commence such alterations and complete the same as soon as practicable thereafter; and upon failure so to do, it shall be deemed guilty of a misdemeanor, and punished as hereafter provided. (Revised Ordinance 1887, Sec. 589.)

Sec. 612. Privileges conferred; on what conditions.—No person or persons, corporation or association, shall be entitled to any of the privileges conferred by this article, except upon the following conditions: That said person or persons, corporation or association, before availing himself or itself of any of the rights or privileges granted by this article, shall file with the city register his or its acceptance of all the terms of this article, and agree therein that he or it will file with the comptroller of the city, on the first days of January and July of each year, a statement of his or its gross receipts

from his or its business arising from supplying electricity for light or power for the six months next preceding such statement, which shall be sworn to by such person or persons, or the president or secretary of such corporation or association; and further agree that he or it will, at the time of filing such statement with the comptroller, pay into the city treasury two and one-half per cent. on the amount of such gross receipts up to the year eighteen hundred and ninety, and five per cent. on the amount of gross receipts thereafter. And said person or persons, or corporation or association, shall, at the time of filing said acceptance, also file with the city register his or its penal bond in the sum of twenty thousand dollars, with two or more good and sufficient securities, to be approved by the mayor and council, conditioned that he or it will comply with all the conditions of this article, or any ordinance which may be hereafter passed regulating the placing of wires, tubes or cables in the streets and alleys for the purposes named therein; that he or it will comply with all the regulations made by the Board of Public Improvements having reference to the subject embraced in this article or any ordinance herein named; that he or it will make the statements and payments required by the provisions of this section, and will save the City of St. Louis harmless and indemnified from all loss, cost, or damage by reason of the exercise of any of the privileges granted by this article or any ordinance which may be hereafter passed relating to the subject-matter of this article. (Revised Ordinance 1887, Sec. 590.)

Sec. 613. Penalty.—Any person or persons, cor-

poration or association which, or any president, manager, superintendent, or officer in charge of any corporation or association who shall violate or fail to comply with any of the provisions of this article, shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined not less than fifty dollars, nor more than five hundred dollars. (Revised Ordinance 1887, Sec. 591.)

Sec. 614. Reservation of rights.—The city reserves the right to alter, amend or repeal this article at any time. (Revised Ordinance, Sec. 592.)

It is true that relator did not previous to the passage of said ordinance No. 16,894 accept the provisions of said article 11, chapter 15, Revised Ordinance 1887, and that it has never accepted the provisions of said ordinance No. 16,894, and that it, said relator, has not been authorized by ordinance of the municipal assembly of the City of St. Louis to place its wires, tubes, or cables under the streets or alleys of said city.

Relator denies that the requirements of said city ordinances set forth were or are legal and binding and valid provisions so far as the rights of this relator under its charter were or are concerned, and denies that as against this relator said City of St. Louis had or has the lawful right or power to adopt or enforce the same, whether under the provisions of paragraph 2 of section 26 of article 111 of the charter of said city, as by respondent alleged, or under any other provision of the charter of said city.

Relator further shows to the court that by reason of the exemptions contained as aforesaid in section

8 of said Act of March 27, 1857, relator's charter as granted in and by said Act of 1857 and as subsequently amended by the Act of March 26, 1868, hereinbefore mentioned, was and is a contract by the State of Missouri with relator, which was not nor is subject to alteration, suspension, or repeal by the State of Missouri or by any municipality thereof; that said City of St. Louis had not nor has lawful power by ordinance or otherwise to impair the obligation of said contract, nor to abridge or interfere with the full exercise by relator of any corporate franchise thereby granted to it; that the enforcement against said relator of said provisions of said ordinance of said City of St. Louis would be a denial to relator of its corporate rights and franchises aforesaid and would impair the obligation of the said contract of the said State of Missouri contained in relator's charter as amended, and would be in contravention of section 15 of article 11 of the Constitution of Missouri, 1875, forbidding the General Assembly to pass any law impairing the obligation of contracts, and also of section 10 of article 1 of the Constitution of the United States, forbidding any State to pass any such law, each of which constitutional provisions is hereby referred to and relied on by relator for the protection of its corporate rights and franchises aforesaid in this behalf.

Relator further shows to the court that the only condition annexed by its charter, as amended, to the exercise by relator of its right to establish and lay down in said city all pipes, fixtures, or other thing properly required in order to carry on relator's said lighting business, is that the same shall be done

with as much dispatch and as little inconvenience to the public as possible, and avers not only that in making its arrangements and preparations to lay its wires under ground along and under the streets of said city as in its petition in this behalf alleged, and in applying to respondent as street commissioner of said city for a permit to make the necessary excavation therefor, relator has fulfilled every condition to which it was or is lawfully subject in that behalf, but also that respondent in refusing to relator such permit did not allege as a ground for such refusal, nor did in fact refuse such permit for the reason that by laying its wires under ground in the manner by it proposed relator would cause any inconvenience to the public, but expressly and unconditionally refused to permit relator to make any excavation in any street of said city.

Relator shows to the court that, as against this relator, the said ordinances and provisions above mentioned are not valid, legal, or binding enactments, nor constitute any defense to this proceeding:

Because, as relator avers, said provisions are not, so far as relator's rights are concerned, lawful or reasonable regulations of the use of the streets of said city, but were intended to and do prohibit relator from exercising its said charter rights and powers except upon compliance by relator with conditions which the City of St. Louis has not nor has the Municipal Assembly thereof any lawful right or power to impose on relator in that behalf, including as one of said conditions that relator shall first be duly authorized thereto by the Municipal Assem-

bly, thereby impairing the obligation of the contract contained in relator's charter as amended.

Because the enforcement against relator by said cityor any officer thereof of the conditions prescribed by said ordinances would not be a lawful or reasonable exercise of the power of said city under its charter to regulate the use of its streets or of the police power of said city, but is an attempt by said city under control of its charter powers to compel relator to enter into the obligations and to pay to said city, from time to time, the tax of five per cent. upon the gross annual receipts from relator's business prescribed by section 590, article 11, chapter 15, of the Revised Ordinance 1887, re-enacted as section 612, article 11, chapter 15, of the Revised Ordinance 1892, above mentioned; forasmuch as it is provided by said section 590, article 11, chapter 15, of the Revised Ordinance 1887, re-enacted as section 612, article 11, chapter 15, of the Revised Ordinance 1892, that no person or persons, corporation or association shall be entitled to any of the privileges conferred by said article 11, chapter 15, except upon fulfilling the several conditions in said section 612 prescribed, as hereinbefore set forth.

Because among the conditions prescribed by said section 590, re-enacted as section 612, relator would be compelled before availing itself of any of the rights or privileges mentioned in said article 11, chapter 15, Revised Ordinance 1887, re-enacted as article 11, chapter 15, Revised Ordinance 1892, to file with the city register its penal bond in the sum of twenty thousand dollars, conditioned that rela-

tor will comply with all the conditions of said article 11 or with any ordinance which might thereafter be passed, and will comply with all regulations which may be made by the Board of Public Improvements having reference to the subject-matter embraced in said article 11 or any ordinance therein named; all which requirements and conditions are a denial of relator's rights under its charter and impair the obligation of the contract therein as aforesaid.

Because said article 11, chapter 15, Revised Ordinance 1887, re-enacted as article 11, chapter 15, Revised Ordinance 1892, purports to authorize the Board of Public Improvements of said city, in granting a permit for the use or occupation of the streets, alleys, and public places of said city for the purposes therein mentioned, to prescribe such restrictions, regulations and qualifications as said board may think fit in respect of the use of said streets, alleys and public places, and requires every person or corporation obtaining such permit, as a condition of availing itself of the privileges mentioned in said article 11, to agree to comply with all such regulations made by said board, whereas the power to regulate the use of the streets of said city, granted—clause 2, section 26, of article 11, of its charter, is granted only to the mayor and assembly of said city, to be exercised by ordinance not inconsistent with the constitution or any law of this State or with said charter, and does not authorize the said mayor and municipal assembly or either of them by ordinance, or otherwise, to delegate to the Board of Public Improvements of

said city, the power to make the regulations for the use of said streets. Wherefore, relator says, that said requirements and said condition are unlawful and void.

And relator says that the several conditions and requirements prescribed in said article 11, chapter 15, Revised Ordinance, 1887, as amended and re-enacted in article 11, chapter 15, Revised Ordinance, 1892, are not independent of each other, but are so framed as to subject relator, its officers and agents, to the penalties prescribed in section 591, of Revised Ordinance, 1887, re-enacted as section 613 of Revised Ordinance, 1892, unless, before placing along, across, or under any street of the City of St. Louis, any wires, such as hereinbefore mentioned, it, said relator, shall not only have obtained authority so to do from the municipal assembly of the City of St. Louis, but shall also have filed in the office of the Board of Public Improvements of said city an application therefor, such as prescribed in section 583, Revised Ordinance, 1887, re-enacted as section 605, Revised Ordinance, 1892, and shall have obtained a permit therefor from said board with such restrictions, regulations, and qualifications as by it prescribed, and shall also have filed with the city register its acceptance of all the terms of said article 11, chapter 15, and shall therein agree as required by section 590, Revised Ordinance 1887, re-enacted as section 612, Revised Ordinance 1892, to file with the comptroller of said city sworn semi-annual statements of its gross receipts from its business, and to pay to the city treasurer a tax of five per cent.

upon the amount of such gross receipts, and shall also have filed with the city register its bond in the sum of twenty thousand dollars, conditioned as prescribed in said section 590, Revised Ordinance 1887, re-enacted as section 612, Revised Ordinance 1892; all which requirements and conditions are a denial of relator's rights under its charter and impair the obligation of the contract contained therein as aforesaid.

Wherefor relator says that it was not under any legal obligation to apply to the municipal assembly of said city for authority, nor to the Board of Public Improvements of said city for a permit, to place its wires under ground in any street thereof, and that it was the duty of respondent as street commissioner of St. Louis, under the provisions of section 568, article 11, chapter 15, of the Revised Ordinance 1887, of said City of St. Louis, to issue to relator a permit for an excavation, such as applied for by relator.

Relator denies that either on the 26th of March, 1868, or on the 2d of March, 1857, lighting by electricity was wholly unknown to art. On the contrary, relator avers that long before either of said dates electricity had been used for illuminating purposes, and apparatus had been devised and publicly exhibited to great numbers of persons by means of which solid bodies were made incandescent by electric currents so as to produce light which could

be and was used for purposes of illumination, substantially as hereinbefore set forth.

THE LACLEDE GAS LIGHT COMPANY,
Relator,
By HENRY HITCHCOCK,
G. A. FINKELNBURG,
I. H. LIONBERGER,
Its Attorneys.

That afterwards, on the 29th of June, 1895, respondent demurred to relator's reply or plea to the return, as follows:

In the Supreme Court of Missouri, April Term, 1895.

State *ex rel.* Laclede Gas Light Company, Relator,
vs.
M. J. Murphy, Street Commissioner, etc., Respondent.
No. 7434.

Now comes said respondent and demurs generally to relator's reply to this respondent's return herein and assigns the following grounds herefor, to-wit:

First. Because said reply does not state facts sufficient to constitute a defense to respondent's return.

Respondent further demurs specially to all that portion of relator's reply beginning at line 4 on page 1 with the words "that it, said relator, is advised," etc., and ending on line 12 of page 4 of said reply with the words "or any part thereof," and

assigns the following grounds for this special demurrer, to-wit:

1st. Because said matters are mere conclusions of law.

2d. Because said matters do not show any right or power in relator to have or ask the rights prayed for in this proceeding.

3d. Because said matters show on their face that relator's charter had expired prior to the institution of this proceeding, and therefore relator has no standing in court and no right to engage in business at all.

Respondent further demurs specially to all that part of relator's reply beginning at line 13 on page 4 thereof with the words "relator is advised and avers that even if the averment in respondent's return," etc., and ending on line 21 of page 6 thereof with the words "entirely avoided by placing said wires in said conduits," and assigns the following grounds for this special demurrer:

1st. Because it appears therefrom that relator has no power to manufacture or vend electricity.

2d. Because it appears therefrom that electricity may be used for producing light, and may be used in place of or as a substitute for gas light, but it further appears that relator never had any power to manufacture or use the same.

3d. Because it appears affirmatively from said reply that electricity is not a substance or material, and relator has no right to manufacture and vend the same.

Respondent further demurs specially to all that portion of relator's reply beginning at line 2 on

page 7 with the words "relator admits that by Art. 2, Chap. 15, Revised Ordinances of the City of St. Louis, 1887," etc., and ending at line 18 on page 13 with the words "as applied for by relator," and assigns the following grounds for this special demurrer, to-wit:

1st. Because it affirmatively appears from such allegations of relator's reply that relator is subject to the police regulations contained in said ordinance provisions.

2d. Because said ordinance provisions do not in any manner impair the obligation of any contract relator may have or at any time may have had, but they are valid regulations in any event.

Respondent further specially demurs to all that part of relator's reply beginning at line 19 on page 13 thereof with the words "relator denies that either on the 26th of March, 1868, or on the 2d of March, 1857, lighting by electricity was wholly unknown to art," and ending on line 25 of page 13 thereof with the words "substantially as hereinbefore set forth," and assigns the following grounds for this special demurrer, to-wit:

1st. Because relator never having had the right to manufacture or vend electricity, it is not material to it or to this controversy whether or not electricity was known to art on the 2d of March, 1857, or on the 26th of March, 1868.

2d. Because the Act of 1868 did not confer any more power on relator in respect to lighting by electricity than was conferred by the Act of 1857, and relator is not entitled to the benefit of anything

which became known to art in this respect between March 2d, 1857, and March 26th, 1868.

Respondent respectfully prays the court to pass upon each and every one of the propositions herein raised. The questions have all been fully presented and must at no distant future date be decided, and it will be labor saved, both for the court and counsel, to have the whole matter passed upon in this proceeding.

Respondent is perfectly willing to have the court pass on all these questions on the arguments and briefs heretofore made and filed; but if the court is not sufficiently advised concerning all of said matters, then respondent respectfully prays that the court will set a time for hearing further argument in the premises.

Respondent earnestly prays the court to settle all these questions in this proceeding at this time because of the great pressing necessity to the City of St. Louis to have these matters settled, for their bearing on other pending questions in this city make it absolutely imperative that they should all be definitely decided, so that the city may know what its rights are in determining the questions now before it with reference to the use of its streets.

Respectfully submitted,

W. C. MARSHALL,
Att'y for Respondent.

Thereafter, on the 1st of July, 1895, the respective parties hereto filed the following stipulation in the cause:

In the Supreme Court of Missouri. Court *in Banc.*

State *ex rel.* Laclede Gas Light Company, Relator, *vs.* Michael J. Murphy, Street Commissioner of the City of St. Louis, Respondent.	April Term, 1895. No. 7434.

It is hereby stipulated and agreed by and between the relator and the respondent in the above entitled cause, by their respective attorneys, as follows:

1. That by consent of said parties respectively and by leave of said court the City of St. Louis may enter its appearance as a party to said cause, intervening therein for its own interest in respect of the several matters and things in the petition of relator and in the alternative writ in this behalf set forth, and said city hereby enters its appearance herein, and the said City of St. Louis, by like consent and leave of court, hereby adopts as its own the return heretofore filed by respondent to said alternative writ, and also adopts as its own the demurrer filed by said respondent.

HENRY HITCHCOCK,
G. A. FINKELNBURG,
I. H. LIONBERGER,
Attorneys for Relator,
W. C. MARSHALL,
Attorney for Respondent and for the City of St. Louis.

Afterwards, on the 2d of July, 1895, the Supreme Court of Missouri entered the following judgment in the cause:

Final Judgment.

The State of Missouri on the Relation of The Laclede Gas Light Company, Relator, vs. Michael J. Murphy, Street Commissioner of the City of St. Louis, and the City of St. Louis, Respondent.	*Mandamus.*

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court grants leave to the City of St. Louis to be made a party defendant herein and to adopt the return and demurrer heretofore filed by respondent Murphy, and thereupon the said demurrer of respondents Murphy and The City of St. Louis to the reply of relator being submitted, and the court, being now sufficiently advised of and concerning the premises, doth order and adjudge that the demurrer of respondents Murphy and The City of St. Louis to the reply of relator be sustained for the reasons given in the opinion heretofore rendered in this cause, to which reference is hereby made as part of this judgment. Thereupon in open court relator declines to plead further; and the court doth further order and adjudge that the peremptory writ of *mandamus* prayed for herein be, and the same is hereby, denied, and that the said respondents recover against the said relator their costs and charges herein expended and have therefor execution.

Afterwards relator (now plaintiff in error) filed in this Honorable Court, at the October Term, 1895, the following assignment of errors:

In the Supreme Court of the United States. October Term, 1895.

State of Missouri *ex rel.* Laclede Gas Light Co., Relator, Plaintiff in Error,
vs.
M. J. Murphy, Street Commissioner of the City of St. Louis, and The City of St. Louis, Respondent, Defendants in Error.

On the second Monday of October in this same term, before the justices of the Supreme Court of the United States, in the City of Washington, comes the relator, the said Laclede Gas Light Company, by its attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to-wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said respondents and against the said relator, whereas by the law of the land the said judgment ought to have been given for the said relator and against the said M. J. Murphy and the City of St. Louis, and the writ of *mandamus* should have been awarded to relator as prayed for, and relator by its attorneys says:

That the Supreme Court of the State of Missouri erred in overruling relator's demurrer to respondent's return.

And the said court erred in overruling relator's motion to strike out portions of respondent's return.

And the said court erred in sustaining respondent's demurrer to relator's traverse and reply to respondent's return.

And said court erred in entering final judgment for respondents on the pleadings in this cause.

And said court erred in denying to relator the writ of *mandamus* prayed for in its petition in this behalf.

And the court erred in deciding that the ordinance of the City of St. Louis pleaded by respondents, and which is fully set out in relator's reply, is a valid ordinance and binding upon relator, and in deciding that said ordinance does not impair the obligation of a contract between relator and the State of Missouri, and does not impair the vested rights of relator under its charter and the franchises granted to it by the State of Missouri prior to the enactment of said city ordinance.

And said court erred in deciding that said ordinance of the City of St. Louis was a lawful exercise of the police power and binding as such on relator, and that relator was subject to all the provisions and requirements of said city ordinances in the conduct of its business, and that it was bound to accept the same with all its provisions and conform to all its requirements before using the streets of said city for laying its wires beneath the surface of the streets for the purpose of conducting electricity through the City of St. Louis for illuminating purposes.

And said court erred in holding that the art of producing by electricity was wholly unknown to science at the time the charter and franchise were granted to relator.

And the said Laclede Gas Light Company, relator, prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that

it may be restored to all things which it hath lost by occasion of the said judgment, etc.

THE LACLEDE GAS LIGHT CO.

By HENRY HITCHCOCK,
G. A. FINKELNBURG,
I. H. LIONBERGER,
Its Attorneys of Record.

BRIEF.

I.

THE FIRST DEFENSE MADE BY RESPONDENT IS THAT THE ACT OF MARCH 26TH, 1868, IS UNCONSTITUTIONAL, NULL AND VOID, AND IS IN CONFLICT WITH PAR. 2, OF SEC. 1, OF ART. 8, OF THE CONSTITUTION OF MISSOURI 1865, WHICH PROVIDES AS FOLLOWS:

"NO LAW SHALL BE PASSED REVIVING OR RE-ENACTING ANY ACT HERETOFORE PASSED, CREATING ANY PRIVATE CORPORATION, WHERE SUCH CORPORATION SHALL NOT HAVE BEEN ORGANIZED AND COMMENCED THE TRANSACTION OF ITS BUSINESS WITHIN ONE YEAR FROM THE TIME SUCH ACT TOOK EFFECT, OR WITHIN SUCH OTHER TIME AS MAY HAVE BEEN PRESCRIBED IN SUCH ACT FOR SUCH ORGANIZATION AND COMMENCEMENT OF BUSINESS;" AND THAT THE LACLEDE GAS LIGHT COMPANY DID NOT ORGANIZE NOR COMMENCE BUSINESS WITHIN ONE YEAR AFTER THE PASSAGE OF THE ACT OF MARCH 2D, 1857, BUT, ON THE CONTRARY, DID NOT COMMENCE BUSINESS UNTIL THE YEAR 1873, AND THEREFORE THE ACT OF MARCH 26TH, 1868, WHICH WAS AN ACT REVIVING AND RE-ENACTING THE ACT OF MARCH 2D, 1857, IS IN CONFLICT WITH SAID CONSTITUTIONAL PROVISIONS.

The relator demurs to this defense on the ground that the Act of March 26th, 1868, is not a law reviving or re-enacting any act theretofore passed, and hence is not within the provisions of, nor in conflict with, said constitutional provisions. And furthermore, because, admitting that the Act of March 26th, 1868, is a law reviving or re-enacting

an act previously passed, yet under the Act of March 2d, 1857, relator does not come within the provisions of said constitutional provisions, because the Act of March 2d, 1857, did not specify any time within which relator should organize and commence business, but that by Sec. 8 of said Act of 1857, relator was specially exempted from the provisions of sections 6 and 7 of Art. 1 of the general law of the State of Missouri, concerning corporations then in force, being Secs. 6 and 7 of "An act concerning corporations," approved November 23d, 1855.

The charter powers of the Laclede Gas Light Company by the terms of the Act of March 2d, 1857, would expire on the 2d of March, 1887. Whilst it is true that Sec. 1 of the act gave the incorporators, their successors and assigns, the right to have "perpetual succession," yet by Sec. 5 of said act they were entitled to have and enjoy the rights, privileges and franchises granted, "during the continuance of this act," and by section 9 of the act it was provided that it "shall continue in force thirty years."

It is true that Sec. 6 of the act gave the City of St. Louis the right to purchase all of the property and effects of the Laclede Gas Light Company at any time within twenty years from the organization of said company, and provided that if the city failed or refused so to do, then the charter so granted should be "renewed and extended for the further period of thirty years after the expiration hereof."

If this act had never been amended the practical working thereof would have been this: Inasmuch as Sec. 8 of the act exempted the Laclede Gas Light

Company from the operation of Secs. 6 and 7 of the law of 1855, which required every corporation to organize and commence business within one year from the date of its charter, the Laclede Gas Light Company could have postponed the organization of the company to any date within the thirty years authorized for its duration, and the City of St. Louis would have had a right to purchase within twenty years from the date of such organization. If, therefore, the company organized in 1886, its life would have ceased in 1887, yet, the city would have had a right to purchase at any time within twenty years from 1886, or, in other words, the right to purchase would have extended nineteen years after the corporate rights of relator had ceased. But assuming that such is the legal incongruity flowing from the Act of 1857, still it is contended that the City of St. Louis failed within twenty years from the organization and commencement of business of the Laclede Gas Light Company to purchase the property and effects thereof, and hence its life was extended till 1917. On the contrary it is alleged in the return, and admitted by the demurrer, that said company did not organize and commence business until 1873 and it is alleged by relator, and admitted by respondent, that in 1868, five years before the company organized and commenced business, the right of the city to purchase was attempted to be taken away, if not actually taken away, by Sec. 3 of the Act of 1868. Hence, it follows, that before the right of the city to purchase had accrued, such right was taken away by the Act of 1868, if it was a valid act. Therefore, the life of the Laclede Gas Light Com-

pany cannot be construed to have been extended for thirty years more after March 2d, 1887.

If, however, the Act of 1868 is altogether unconstitutional, then inasmuch as the relator organized and commenced business in 1873, and inasmuch as the right of the city to purchase would extend until twenty years thereafter, to-wit, until 1893, and inasmuch as the corporate life of relator, by the terms of Sec. 9 of the Act of 1857, ceased in 1887, or five years before the expiration of the time the city had the right to purchase, it therefore follows that under this view the corporate life of relator cannot be held to be extended for thirty years after 1887.

The conclusion, therefore, is irresistible that in no event can it be held that the corporate life of relator was extended for thirty years after 1887, or in other words, until 1917.

UNLESS, THEREFORE, THE ACT OF 1868 EXTENDED THE LIFE OF RELATOR "FOREVER," THE FRANCHISES, RIGHTS AND PRIVILEGES OF THE LACLEDE GAS LIGHT COMPANY EXPIRED IN 1887.

The question, therefore, is: Was the Act of 1868 a constitutional act, within the power of the legislature to enact, in view of Par. 2 of Sec. 1 of Art. 8 of the Constitution of 1865, which prohibited the legislature from passing any law reviving, or re-enacting, any act theretofore passed creating any private corporation, where such corporation should not have been organized and commenced business within one year from the time such act took effect, or within such other time as may have been prescribed in such act for such organization and commencement of business.

It will be conceded, of course, that the Laclede Gas Light Company was specially exempted from the operation of Sec. 6 of the General Corporation Laws of 1855, and that it was, therefore, not obliged, under its charter, to organize and commence business within a year. But though this is true, it is likewise true that the Constitution of 1865 forbade the passage of any law reviving or re-enacting any act previously passed creating any private corporation unless such corporation had organized and commenced the transaction of its business within one year from the time the act of incorporation took effect. *The Laclede Gas Light Company was not exempted from these constitutional provisions, and, although its charter did not require it to organize within a year, still the constitution of* 1865 *prohibited the legislature from reviving or re-enacting its charter, because it had not organized within one year.* In other words, its charter would have continued until 1887, without question, but when the legislature undertook to revive or re-enact its charter, by the Act of 1868, it did so in violation of the constitutional provisions referred to, and the Act of 1868 is, therefore, null and void.

This conclusion follows, logically. But relator seeks to avoid the conclusion by contending that the Act of 1868 is not an act reviving or re-enacting the Act of 1857. Hence it becomes necessary to understand what is meant by reviving or re-enacting an act.

In this discussion, I shall content myself with considering what is meant by the term "re-enact."

Webster's Dictionary defines the word, "re-enact," to mean, "to enact again."

In all of the litigation between the City of St. Louis and the Gas Light Companies, the question here involved has never been referred to, nor passed upon by this or any other court.

The cases of the Mayor, etc., of Boonville v. Trigg, 46 Mo. 288, and French v. Woodward, 58 Mo. 66, did not discuss nor decide the question here involved, but were decided with reference to Sec. 25 of Art. 4, hereinafter referred to under the second defense in this case.

I contend that the Act of 1868 "enacts again" the Act of 1857, and relator, practically, concedes this in its motion to strike out the eight defense by assigning as one of the grounds therefor the following:

"And it further appears from the terms of said Act of March 26th, 1868, by which said Act of March 2d, 1857, was amended, as set forth in relator's petition, that all the rights, privileges and franchises granted to said relator by said fifth section of the Act of March 2d, 1857, were, by said amendatory Act of March 26th, 1868, *confirmed to relator*, without annexing to any such right, privilege or franchise, any condition that such substitute should be only such as was known to art at the date of the approval of said amendatory act."

It will aid in the solution of this question to ascertain what is meant by the word "enact." *Webster defines "enact" to be* "1, *to decree; to establish by legal and authoritative act; to make into a law; especially to perform the last act of legislation to, as a bill, giving it the validity of law.*" *"Re-enact" therefore means to do such acts over again.*

The Act of 1868 re-enacts the Act of 1857. The Act of 1857, in Sec. 5, conferred rights "during the continuance of this act," that is, until 1887. The Act of 1868 undertakes to confer these rights forever, thereby the Act of 1868 re-enacts the Act of 1857,

creating the Laclede Gas Light Company, and if the act is constitutional, according to relator's contention, extended the life of the corporation from 1887 to an unlimited period of time, and at the same time extended the rights and franchises, which, according to the Act of 1857, would have expired in 1887, to an indefinite term.

Without the Act of 1868 *relator has no legal existence now and no legal right to any of the franchises claimed.* It seems to me, therefore, too clear for argumemt, that the Act of 1868, re-enacts to a most essential and vital degree, the Act of 1857. If it does, then, isasmuch as it is admitted that the Laclede Gas Light Company did not organize and commence business within one year after 1857, it follows conclusively, that the Act of 1868 is just such an act as Par. 2 of Sec. 1 of Art. 8 of the Constitution of Missouri expressly prohibited the legislature from passing. *As stated before, the fact that the Laclede Gas Light Company was exempted from the operation of Sec.* 6 *of the Act of* 1855, *does not, in any manner, exempt it or the legislature from the operation of Par.* 2 *of Sec.* 1 *of Art.* 8 *of the constitution of* 1865.

The Act of 1868 further re-enacts and enlarges the Act of 1857, in this, that by Sec. 1, it provides that:

The Laclede Gas Light Company, "may, at any time, lease, sell, or dispose of any portion of said rights, privileges and franchises to individuals, associations, or corporations intending or desiring to exercise the same within any portion of the limits aforesaid."

This is a most valuable franchise, the extent of which can only be appreciated, when it is understood that the relator claims, thereby, to have not only been vested with the power to exercise all the rights, privileges and franchises conferred upon it itself,

but also with the power to lease, sell or dispose of the right to other persons to do the same thing. In other words, to enjoy these rights itself, and also to permit other persons to enjoy the same rights at the same time upon such terms as to it might seem proper.

I do not concede for a moment, that this construction is the proper construction to place on this grant. I construe this part of the Act of 1868 to mean that the Laclede Gas Light Company can lease, sell or dispose of to other persons, the whole of its rights and franchises, or can lease, sell or dispose of only a part thereof, but that by as much as they sell, lease or dispose of them they strip themselves of the right to exercise such privileges themselves.

If the construction contended for by relator is the true construction, then this portion of the Act of 1868 amounts to a delegation of legislative power, and is, therefore, void. Prior to 1875, when the new Constitution of Missouri and the Charter of the City of St. Louis were adopted, the title to all streets and rights in the State was vested in the State, subject to the Act of Feb. 20th, 1865 (Sess. Acts 1864-5, page 439), and the legislature, alone, had power to permit any one to use the same, except for travel. Since the constitution of 1875, and the Charter of St. Louis were adopted, and under the Act of 1865, the right to control the use of the streets in St. Louis has been, and is now, vested in the City of St. Louis; and the Municipal Assembly alone, by ordinance, has the right to permit the streets and highways of the city to be used by any person, except for travel. This being so, the legislature could not grant to the

Laclede Gas Light Company the right to authorize any one else to use such streets and highways, for such an act would be clearly a delegation of the power vested in the legislature to a private and *quasi* public corporation, and in conflict with the rights of the City of St. Louis under the Act of 1865.

City of St. Louis v. Russell, 116 Mo. 248.

It is essential to the decision of this case that a construction be placed on this provision of the Act of 1868. For, unless it is done, the same question must arise, again and again, until it is finally settled, and to avoid litigation and settle the matter, I earnestly ask the court to pass on this proposition in this case.

In this respect the Act of 1868 re-enacts the Act of 1857, contrary to the provisions of the constitution of 1865, before referred to.

The Act of 1868 re-enacts the Act of 1857 in a further essential particular.

By the Act of 1857 the capital stock of the company was fixed at not less than fifty thousand dollars, and authorized to be increased to not more than two millions. The Act of 1868 authorizes the increase of the capital stock "to such amount as may be necessary to carry on its business."

This, too, in the face of Sec. 7 of Chap. 62, Rev. Stat. 1865, which provided as follows:

"Any private or public corporation may increase its capital stock to any amount not exceeding double the amount of their authorized capital, etc."

In this respect the Act of 1868 re-enacts the Act of 1857 and conflicts with the constitutional provisions of 1865.

II.

THE SECOND DEFENSE INTERPOSED BY RESPONDENT IS, THAT THE ACT OF MARCH 26TH, 1868, IS NULL AND VOID AND IN CONFLICT WITH SEC. 25, OF ART. 4, OF THE CONSTITUTION OF 1865, WHICH IS AS FOLLOWS: "NO ACT SHALL BE REVIVED OR RE-ENACTED BY MERE REFERENCE TO THE TITLE THEREOF; NOR SHALL ANY ACT BE AMENDED BY PROVIDING THAT DESIGNATED WORDS THEREOF SHALL BE STRUCK OUT, OR THAT DESIGNATED WORDS SHALL BE STRUCK OUT AND OTHERS INSERTED IN LIEU THEREOF; BUT IN EVERY SUCH CASE THE ACT REVIVED OR RE-ENACTED, OR THE ACT OR PART OF ACT AMENDED SHALL BE SET FORTH AND PUBLISHED AT LENGTH, AS IF IT WERE AN ORIGINAL ACT OR PROPOSITION."

The particular claim made in this respect by respondent is, that the Act of March 26th, 1868, is an act reviving and re-enacting the Act of March 2d, 1857, and that it violates this provision of the constitution of 1865, in that it refers to "all the rights, privileges and franchises granted to it by the 5th section of the act to which this act is amendatory," which language is absolutely unintelligible without reference to Sec. 5 of the Act of 1857, and reading it into the Act of 1868 the provisions of the Act of 1857, which conferred such rights, privileges and franchises; and that it strikes out from the 5th section of the Act of 1857, the words "during the continuance of this act," and substitutes therefor the word "forever;" and, in that, the Act of 1868 attempts to repeal Sec. 6 of the Act of 1857, by simply employing the following language: "and the 6th

section of said act, to which this act is amendatory, is hereby repealed."

Relator demurs to this defense, claiming that the Act of 1868 was not, and did not, purport to be an act reviving or re-enacting the Act of 1857, and that it did not amend, nor purport to amend, the Act of 1857, by striking out designated words and inserting others in lieu thereof.

In making this defense, I was not forgetful of the principles decided in the cases of State v. Chambers, 70 Mo. 265; State v. Thurston, 92 Mo. 325; State v. Hendricks, 98 Mo. 374; Morrison v. St. L., I. M. & S. Ry. Co., 96 Mo. 602; State *ex rel.* v. Miller, 100 Mo. 439; State v. Bennett, 102 Mo. 364, and Railroad v. Schaumbaugh, 106 Mo. 557.

Neither do I wish to be understood as contending that there cannot be an amendment or repeal by implication.

What I do insist upon is, that under the constitution of 1865 (Par. 4, Sec. 1, Art. 8), the legislature was prohibited from passing special acts creating corporations, except for municipal purposes, and that the policy of prohibiting the granting of special privileges to private corporations had become a necessity in this State, because of the great abuse to which the former power of the legislature had been put, either by accident, carelessness or design.

It was further established as the policy in this State, that the legislature should not give life to, nor extend, revive, re-enact or enlarge the powers of any corporation, except such as had organized

and commenced business within one year from the date of the passage of the act creating it.

It was also intended to put it beyond the power of the legislature to pass laws amending prior laws, by simply referring to the title, or by striking out a word here and there, and inserting another or others in lieu thereof, and thus leaving the law in such shape that the legislators themselves might not know exactly what they intended or were doing, or in such shape that the citizen could not determine for himself, without comparison of the acts, what the law was, and in many cases leaving the law in such shape that even conscientious lawyers disagreed as to what had been accomplished by such method of amendment; and also to put a stop to the practice of interested parties procuring the passage of bills so worded that the legislators themselves could not see the full meaning of the amendment, and only learned, after the amendment had been made, what they had done, many times that being what the legislature would not have knowingly done; and to require that all laws amending other laws should be published in full, like an original act, so that the legislature, the people and the lawyers could see, at a glance, what was intended to be done and what had been done.

In short, to borrow the language of the Supreme Court of Michigan, in People v. Mahaney, 13 Mich. 497, in construing a similar constitutional provision: "The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effects, and the public, from the

difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purports only to insert certain words, or to substitute one phrase for another in an act or section *which was only referred to but not published,* was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for the express purpose. Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation."

The Act of 1868 does not, it is true, provide that certain words shall be stricken out and other words inserted in lieu thereof, and as I understand relator's contention it is that this provision applies only to "*such*" cases.

I might contend that the word "such" in this section should be rejected as a clerical inaccuracy, as was done in State v. Beasley, 5 Mo. 91, but I desire to take a broader view than this, and to say that the Act of 1868 does strike out words from the Act of 1857 and substitute other words therefor, in this, it strikes out the words "during the continuance of this act," from the Act of 1857, and inserts in lieu thereof the word "forever," and this, too, without any indication of an intention on the part of the legislature to accomplish any such purpose. This fact is only discoverable by a critical comparison and examination of the two acts, and it may reasonably be argued, that by proceeding in this method, the legislature, itself, did not understand the full meaning of the bill it was enacting, and certainly no layman would readily discover it. It was

to prevent the happening of just such things, that the constitutional provision here relied on was adopted.

But the Act of 1868 conflicts with this section of the constitution, because Sec. 1 of the act unquestionably amends Sec. 5 of the Act of 1857, and Sec. 1 of the Act of 1868 does not publish in full, as if it was an original act, or provision, what rights, privileges and franchises were intended to be granted by it, but refers to "the fifth section of the act to which this act is amendatory," for information as to what rights, privileges and franchises were intended to be exercised forever, and thus this case is taken out from the rule laid down in the cases of State v. Chamber, 70 Mo. 625; State v. Thurston, 92 Mo. 325; State v. Hendricks, 98 Mo. 374; Morrison v. Railroad, 96 Mo. 602; State v. Miller, 100 Mo. 432; State v. Bennett, 102 Mo. 356, and Railroad v. Schaumbaugh, 106 Mo. 557.

The case of Railroad v. Schaumbaugh, *supra*, was a condemnation case, instituted by the railroad. The owner of the land to be condemned filed exceptions to the appraisement of the commissioners, and the exceptions were tried by a jury. The defendant appealed. The railroad was incorporated by the Act of January 22d, 1857, with a capital stock of $2,000,000. No conditions precedent to its being entitled to the benefit of the act were imposed. Thereafter the Act of March 19th, 1866 (Sess. Acts, 1865-6, p. 222), was passed. The defendant claimed that its effect was to *revive* the charter of the railroad company, and that as it was not shown that the company organized and com-

menced business within one year after the Act of 1857 took effect, the legislature was prohibited by section 2 of article 8 of the constitution of 1865 from passing the Act of 1866.

The Supreme Court of Missouri held that there was no proof that the company had not organized and commenced business within one year after the Act of 1857 took effect, and that in the absence of such proof it would presume that it had done so, and that being a live company the constitution of 1865 did not apply.

In the case at bar the conditions are different. It is charged by the return and admitted by the demurrer, that the Laclede Gas Light Company did not organize *and* commence business until 1873. The constitution of 1865 required both organization and commencement of business within one year before the legislature could act. This record shows affirmatively that it is not within the constitutional requirement.

Moreover, I do not insist that the Act of 1868 *revives* the company. My contention is that it *re-enacts*, which may be done even as to a live company. To re-enact is as much prohibited as to revive a dead charter.

Hence the decision in the Schaumbaugh case is not applicable to the case at bar.

The Act of 1868 *cannot be construed as an amendment by implication, but as an attempt to amend the Act of* 1857, *without publishing, in full, even the section amended.*

An act amending an act by implication must be a perfect, enforcing act in itself, and cannot be an

act which must be read into the act amended, nor can it be an act which refers to provisions of acts, without publishing such provisions in full. This method of legislation comes under the rule laid down in Mayor of Booneville v. Trigg, 46 Mo. 288, and in French v. Woodward, 58 Mo. 66, and in People v. Mahaney, 13 Mich. 497.

From the days of Blackstone we have been taught that there are four cardinal rules for construing laws, to-wit: 1*st*, the letter; 2*d*, the context; 3*d*, the spirit and purpose, and, 4*th*, the effects and consequences.

In the case of St. Louis and San Francisco Railway Co. v. Evans and Howard Fire Brick Co., 85 Mo. 307, the Missouri Supreme Court adopted the rule of construction laid down in Story's Constitutional Limitations, expressed in the following language: "Every word employed in the constitution is to be expounded in its plain, obvious and common sense meaning, unless the context furnishes some ground to control, qualify or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for nicities of expression, for critical propriety, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of life, adapted to common wants, designed for common use and fitted for common understanding. The people make them, the people adopt them, the people must be supposed to read them with the help of common sense and cannot be presumed to admit

in them any recondite meaning or any extraordinary gloss."

In State *ex rel.* Harris v. Laughlin, 75 Mo. p. 150, that court, in laying down the rule for the construction of constitutional provisions, said: "In the solution of such a question when presented, resort should not be made to mere verbal criticisms, subtle distinctions, abstract reasoning or nice differences in the meaning of words; and in its consideration the maxim that 'he who sticks to the letter' in the construction of a law, 'sticks in the bark' is peculiarly applicable; *qui haeret in litera, haeret in cortice.*"

Applying these rules of construction to Sec. 25 of Art. 4 of the constitution of 1865, and construing the Act of 1868 in this light and spirit, it is evident that whilst the Act of 1868 does not provide that certain words should be stricken out and other designated words inserted in lieu thereof, and hence the Act of 1868 is not "such case" within the letter of the constitution, nevertheless gauged by the context, the spirit and purpose, and the effects and consequences, aye, measured by its plain, obvious and common sense meaning, stripped of subtleties, nicities and verbal criticism and read in the sense that the people understand it, and bearing in mind the abuses intended to be stopped, the mischiefs to be prevented and the endless confusion to be guarded against, in the light of the history of the adoption of this constitutional provision, I confidently assert that the Act of 1868 falls within the constitutional prohibition quoted, as much as if it

had taken the form prohibited, of striking out words and inserting others in lieu thereof.

Unless this construction is the true construction to be placed on this constitutional prohibition, then the results could be attained, the abuses perpetuated and the mischiefs re-enacted in any case by adopting a different form of expression, that is, by amending a prior act by striking out certain words and inserting others in lieu thereof, without saying, in express terms, that the amendment should be accomplished in that manner.

Aye more, the method here adopted is more pernicious and fraught with more danger than the method previously in force. The former method called attention to the fact that the legislature intended to amend a certain law in a certain method, and the average intelligent citizen could thus, by comparison, see exactly the effect of the amendment, whereas the method here employed does not even call attention to the fact that an amendment is intended, nor to the words to be stricken out and the words to be substituted, but leaves it open to possible litigious dispute as to what words should be stricken out and what words inserted in order to accomplish the result. There can be no manner of doubt that this method of amending a law is contrary to the spirit and purpose of the constitutional provision quoted, and that the effects and consequences are infinitely more objectionable and dangerous than the old method. In a word, if this constitutional provision can be circumvented in this manner, then the provision will have made

possible a greater evil than that intended to be remedied by it.

As before shown this act accomplishes this result, covertly, and in the most insidious and dangerous method imaginable.

III.

THE THIRD DEFENSE INTERPOSED BY RESPONDENT IS THAT THE CHARTER OF THE RELATOR, BY THE TERMS OF SEC. 9, OF THE ACT OF 1857, EXPIRED ON THE 2D OF MARCH, 1887, AND HENCE RELATOR IS NOT ENTITLED TO ANY OF THE PRIVILEGES, RIGHTS AND FRANCHISES CLAIMED BY IT.

The demurrer attacks this defense on the following grounds:

First. That it is erroneous, and inconsistent with the other provisions of the Act of 1857. Second. Because Sec. 6 of the Act of 1857, authorized the city to purchase the property and effects of the company at any time within twenty years after its organization, and provides that if the city fails so to do, the charter shall be extended for an additional term of thirty years, and alleges that the city failed to purchase; and Third, that if the Act of 1868 amending the Act of 1857 is unconstitutional, then Sec.6 of the Act of 1857 is still in force, and that as the city never purchased relator's charter will run until 1917; but if the Act of 1868 is valid, then relator's charter continues forever.

I will discuss this proposition under these three points set out in the demurrer.

FIRST. Is respondent's contention, that under Sec. 9 of the Act of 1857, relator's charter expired in 1887, erroneous and inconsistent with the other provisions of said Act?

Sec. 1 of the Act of 1857, conferred the right to have "perpetual succession."

Sec. 5 granted the rights, privileges and franchises

therein specified "during the continuance of this act."

Sec. 6 gave the city the right to purchase, at any time within twenty years from the date of the organization of the company, and provided that if the city did not purchase, the charter of the company should be extended thirty years after the expiration thereof.

Sec. 9 limited the duration of the company by providing that it should "continue in force for thirty years."

The history of corporations teaches us that there were, originally, two kinds, to-wit: Sole and aggregate.

"A sole corporation, as its name imports, consists only of one person, to whom and his successors belong that legal perpetuity, the enjoyment of which is denied to all natural persons."

1 Blackstone's Com. 469.

"An aggregate corporation, as its name will readily suggest, consists of several persons, who are united in one society, which is continued by a succession of members."

2 Kent, Com. 221.

In Dartmouth College v. Woodward, 4 Wheat. 636, it is said:

"A corporation is an artificial being, invisible, intangible and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to

its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities that corporations were invented and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being."

In Providence Bank v. Billings, 4 Pet. 562, the court said: "The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men."

Thus the words "perpetual succession" in a charter do not mean that a corporation shall live forever or be immortal, but that "the immortality of a corporation means only its capacity to take, in perpetual succession, as long as the corporation exists, so far is it from being literally true that a corporation is immortal, many corporations of recent creation are limited in their duration to a certain number of years. A corporation may not only be limited, as to duration, in its commencement, but,

without limitation, may be dissolved, and, consequently, cease to exist for want of members; also by voluntary surrender of franchise, forfeiture, by misuser," etc.

2 Kent Com. 215.

Recognizing this doctrine, in the case of Fairchild v. Masonic Hall Association, 71 Mo. 526, it was held: That where the right to have perpetual succession was granted, the corporation was clothed with the capacity to live forever, but that where the act creating the corporation conferred the right or capacity of perpetual succession, but limited the duration to a certain number of years, such limitation restricted the meaning of the words "perpetual succession," and at the expiration of the limited period the corporate life ceased.

Applying these principles then to the Act of 1857, we find that by Sec. 1 this company was given the *capacity* of perpetual succession; and by Sec. 5 was granted rights, privileges and franchises "*during the continuance of this act;*" and by Sec. 9 the duration of *the life of the corporation was limited to thirty years.*

If this was all, no doubt could arise that the life of this corporation expired in March, 1887. So that so far from respondent's contention being erroneous or that section 9 of the act is inconsistent with the other provisions of the act, there is no room for controversy, and relator's contention in this regard should be decided against it.

SECOND. Relator contends that Sec. 6 of the Act of 1857 confers upon the city the right to purchase,

at any time within twenty years, after the *organization* of the company, and that as the city failed so to do, the corporate life was extended for an additional term of thirty years.

The fact is that although the charter was granted in 1857 the Laclede Gas Light Company never organized and commenced business until 1873. Under Sec. 6 of the Act of 1857, the City of St. Louis would have therefore until 1893 to determine whether it would purchase. The thirty years limited by Sec. 9 of the act expired in 1887. In other words, relator's contention is that by delaying the organization of the company until 1873, and by the twenty year option which the city had, and which the city was not obliged to exercise until 1893, the charter of relator was kept alive from 1887 until 1893, and that as the city failed to exercise its option in 1893, the corporate life of relator was extended for thirty years after 1887, to-wit: until 1917. That this is a most fallacious and untenable argument can be easily demonstrated. Suppose the company had not organized until 1886, the city would then have had twenty years from that time, or until 1906, in which to purchase, and failing to purchase before 1906 relator's charter would be extended for thirty years after 1887; or, in other words, relator's contention contemplates that it could permit twenty-nine years of its chartered life to expire before it organized, and then it could be kept alive for twenty years after the expiration of such twenty-nine years, because the city had the right to purchase at any time within twenty years after its organization, and failing so to do, the relator's corporate life would be then ex-

tended thirty years from the date when, by the terms of Sec. 9 of the act, it would expire otherwise.

This point hardly seems possessed of enough merit for serious consideration. The legislature never intended any such consequence to arise from the Act of 1857, and I deny that any such incongruity can, logically, be created, or deduced from the provisions of Sec. 6 of the act. Though by the act the company was exempted from the necessity of organizing and commencing business within a year after the passage of the act creating it, nevertheless the legislature never intended, and the act is not susceptible of the construction, that the option given the city should bridge over the time between 1887 and the expiration of the twenty-year option, but on the contrary, it was intended that the company should organize and commence business within a reasonable time so that the twenty-year option should not run beyond 1887.

When it is remembered that this company never organized and commenced business until after the Act of 1868 was passed; and when it is remembered that the Act of 1868 expressly undertook to repeal Sec. 6 of the Act of 1857, and thereby take away the city's option; and when it is remembered that the city's right to purchase began only after the organization of the company, and that such organization did not take place until 1873, the extremity of desperation which begat this contention, on the part of relator, will be readily understood, and I think further comment unnecessary.

THIRD. Relator, however, contends that if the Act of 1868 is invalid, then Sec. 6 of the Act of

1857 is not repealed, and its charter is continued until 1917 under said section 6. This contention has already been considered above.

Relator further contends that the Act of 1868 is a valid act, and, therefore, its corporate life is to continue forever.

As hereinbefore shown, the Act of 1868 amends Sec. 5 of the Act of 1857 without saying so, by providing that the rights, privileges and franchises conferred by Sec. 5 of the Act of 1857 should be held and enjoyed by relator "forever," instead of "during the continuance of this act," as Sec. 5 of the Act of 1857 provided.

No change was made by the Act of 1868, in Sec. 1 or section 9 of the Act of 1857, so that the Act of 1857, amended by the Act of 1868, if the Act of 1868 is a legal act, would read in this way: The company is given the right in Sec. 1 to have "perpetual succession;" is given the right by Sec. 5 to enjoy its franchise "forever;" and Sec. 6 which gives the city an option within twenty years and extends the life of the company an additional thirty years, if the city did not purchase, is stricken out; and by Sec. 9 the continuance of the act, as thus amended, is limited to thirty years from the date of its passage, to-wit, to March 2d, 1887.

THUS SEC. 1 CONFERS THE CAPACITY OF IMMORTALITY; SEC. 5 GIVES THE COMPANY UNLIMITED DURATION; AND SEC. 9 LIMITS THE LIFE OF THE COMPANY TO THIRTY YEARS AFTER MARCH, 1857.

I seriously doubt if greater statutory inconsistency can be found in the laws of any State. This condition arises, and naturally arises, from the methods

employed in this case to circumvent the provisions of Sec. 25, Art. 4, and from disregarding the provisions of Par. 2, Sec. 1, of Art. 8, of the constitution of 1865, and conclusively shows that the legislature was trapped by the Act of 1868 into advertising itself to the world in the peculiar light of having in one section provided that the corporate life of relator should continue forever, and in another section providing that such corporate life should expire in 1887.

A stronger illustration of the perniciousness of this method of legislation could scarcely be conceived.

Such, however, is the condition now presented if the Act of 1868 is constitutional, and it devolves upon this court to say whether the provisions of Sec. 5 confer eternal life on relator, despite the limitation of that life to thirty years by Sec. 9, or whether notwithstanding this peculiar legislative legerdemain, the life of relator is limited to March 2d, 1887, in spite of the amendment by the Act of 1868 to Sec. 5 of the Act of 1857.

Before entering upon the examination of this question, it is proper to inquire what is meant by the words "perpetual" and "forever."

Webster defines "perpetual" to mean: "Never ceasing; continuing indefinitely or infinitely; unending; not subject to, or suffering cessation or interruption; everlasting; enduring; incessant;" and the same author defines "forever" to mean: "To eternity; eternally; through endless ages." He also gives as the synonyms of "forever" the follow-

ing: "constantly; continually; invariably; unchangeably; incessantly; always; *perpetually*, etc."

There is, therefore, no substantial difference between the meaning of the two words, and if the Act of 1857 had simply provided that relator should have "perpetual succession," and had not limited that duration in the act, under the decision in Fairchild v. Masonic Hall Association, *supra*, relator would have continued forever; but because Sec. 9 of the Act of 1857 limited this perpetual, eternal existence forever to thirty years after 1857, relator's life expired at that time.

By changing the term, "during the continuance of this act," to the term, "forever," in Sec. 5 of the Act of 1867, no greater perpetuity was granted to relator than it possessed under the right given it in Sec. 1 to have "perpetual succession," and if Sec. 9 of the act limited the perpetuity conferred by Sec. 1, it likewise limited the perpetuity conferred by the amendment to Sec. 5 as above.

It is a cardinal rule of construction of laws as well as of contracts that the more particular always prevails over the more general. This doctrine was recognized in deciding the Fairchild case, and the same principles obtain here and are equally conclusive as applied to the word, "forever," injected by the Act of 1868 into Sec. 5 of the Act of 1857.

The same conclusion would follow if an act, in its first section prescribed, that A should enjoy certain franchises forever, and then in the same, or a subsequent section, provided that such franchises should be enjoyed only for a specified number of years; such an act would be read to mean: The franchises

here conferred shall be enjoyed forever: provided, however, that the term "forever" here employed shall be taken to mean only thirty years and the franchises here conferred shall cease at the expiration of thirty years. An act in such language, would be a legal curiosity, and yet no court would have any difficulty in holding that the thirty year limitation controlled. Exactly this condition is presented in this case by the Act of 1857, as amended by the Act of 1868, and I confess my utter inability, in the light of the decision in the Fairchild case to comprehend wherein the Act of 1868 extended the life of the relator company beyond the thirty years which Sec. 9 of the act, as amended, provided that it should continue in force.

I, therefore, conclude that the corporate life of relator expired on the 2d of March, 1887.

The relator, however, contends that the proper construction to put on the Act of 1868 is that it is to be regarded as amending by implication the whole of the Act of March 2d, 1857, and not merely an amendment of a part thereof, and hence that section 9, of the Act of March 2d, 1857, is repealed by implication by the Act of 1868.

Respondent contends that this is an ingenious and original argument, but is not effective or convincing.

The Act of 1868 is entitled: "An act to amend an act to incorporate the Laclede Gas Light Company, approved March 2d, 1857." The first section of the act as hereinbefore shown amends section 5, of the Act of 1857, without in terms saying so, and also refers specially to section 5. The second sec-

tion amends section 2, of the Act of 1857, by removing the limit to the amount of capital stock the company may have, without, however, specifically referring to section 2, of the Act of 1857. Section 3 declared that it shall not be construed as affecting the vested rights of the St. Louis Gas Light Company, and then specifically repeals section 6, of the Act of March 2d, 1857. Section 4 repeals the Act of March 3d, 1857; and section 5 provides that the act shall take effect from its passage.

Thus the Act of 1868 changes sections 5 and 2, of the Act of 1857, without specifically referring to the sections changed, and repeals the 6th section of the Act of 1857, and repeals the Act of March 3d, 1857; both in express terms.

On the face of the Act of 1868, therefore, it is manifest that it was the intention of the legislature to affect only sections 2, 5 and 6 of the Act of 1857, and the Act of March 3d, 1857, and not to touch in any manner section 9 of the Act of March 2d, 1857.

Ever since the decision of the case of State v. Morrow, 26 Mo., p. 141, it has been the established law, in Missouri, at least, that: "*The repeal of one clause of a section specifically raises a clear implication that nothing else was intended.*" And further, that: "A repeal of statutes by implication is not favored in the law. These laws all being in relation to the same subject, and in *pari materia*, must be so construed as to make them all stand."

Under this interpretation of the law, it follows clearly that inasmuch as the legislature, by the Act of 1868, referred to sections 2, 5 and 6 of the Act of 1857, and to the Act of March 3d, 1857, it is con-

clusively presumed that the legislature did not intend to repeal, impair or in any manner affect section 9 of the Act of March 2d, 1857.

Possibly the Laclede Gas Light Company, in seeking the passage of the Act of 1868, thought and intended that it would have the effect of repealing section 9 of the Act of March 2d, 1857, but no such intention can be gathered from the words used in the Act of 1868, and under the legal rule above referred to, there can be no question that the Act of 1868 does not repeal, by implication, section 9 of the Act of March 2d, 1857.

But, as I understand it, the relator argues that it would not have accepted the Act of 1868 if the effect of it was to cut off its corporate existence in 1887; for under the Act of 1857, if the City of St. Louis failed to purchase its plant as provided in section 6 thereof, within 20 years after the company was organized its corporate existence would be extended for 30 years after the original 30 years prescribed in section 9, that is, until 1917. Whatever may be said of the wisdom, or want thereof, of the Laclede Gas Light Company in accepting the Act of 1868, the fact remains that it did so, and having done so the court can only construe what the legal effect of that act is, and I respectfully submit that its legal effect is to terminate the corporate life of the Laclede Gas Light Company on the 2d of March, 1887.

IV.

THE SIXTH DEFENSE INTERPOSED BY RESPONDENT IS THAT ART. 2, CHAP. 15, REV. ORD. 1887, AS AMENDED BY ORDINANCE NO. 16,894, PROVIDES THAT NO WIRES, TUBES, CABLES, ETC., CONVEYING ELECTRICITY FOR THE PRODUCTION OF LIGHT, HEAT OR POWER SHALL HEREAFTER BE PLACED ALONG OR ACROSS ANY OF THE STREETS, ALLEYS OR PUBLIC PLACES IN THE CITY OT ST. LOUIS, BY ANY PERSON, CORPORATION OR ASSOCIATION NOT HAVING PREVIOUS TO THE PASSAGE OF THIS ORDINANCE ACCEPTED AND COMPLIED WITH ORDINANCE NO. 12,723 NOW AMENDED, UNLESS THE SAME SHALL BE DULY AUTHORIZED BY THE MUNICIPAL ASSEMBLY, AND THEN ONLY UPON CONDITION THAT THE PLANS SHOWING THE PLACES TO BE OCCUPIED, THE MANNER OF INSULATION, ETC., BE APPROVED BY THE BOARD OF PUBLIC IMPROVEMENTS, AND UNDER A PERMIT ISSUED BY IT; THAT THE RELATOR HAS NOT BROUGHT ITSELF WITHIN THE PROVISIONS OF THIS ORDINANCE BY EITHER APPLYING FOR OR OBTAINED SUCH ORDINANCE AND PERMIT, AND THAT PAR. 2, OF SEC. 26, OF ART. 3, OF THE CHARTER OF THE CITY OF ST. LOUIS, CONFERS THE POWER UPON IT TO ENACT THIS ORDINANCE.

Relator attacks this defense on the ground that its charter constitutes a contract between the State and relator, which, under Sec. 8, is not liable to be altered, suspended or repealed without the consent of the corporation, and that neither the State nor the city has the right to pass any law or regulation which in any manner impair the rights, privileges and franchises granted to it, but that such a law or regulation would be in contravention of Sec. 15,

Art. 2, of the Constitution of Missouri, 1875, which forbids the General Assemby from passing any law impairing the obligation of contracts, and also would be in contravention of Sec. 10, of Art. 1, of the Constitution of the United States which forbids any State from passing any such law; that the ordinance provisions quoted and relied on would impair the obligation of relator's claimed contract.

I think I can conclusively show, by the decision of the highest court in America, that this contention of relator is untenable. A similar question arose in New York, in the case of People of the State of New York *ex rel.* Electric Lines Company v. Squire, 145 U. S. 175; *Ibid.* 14 Daly, 154; *Ibid.* 107 New York, 593.

The relator in that case was organized on the 14th of October, 1882, under the general telegraph law of April 12th, 1848 (Laws, New York, 1848, C. 265): "For the purpose of owning, constructing, using, maintaining and leasing lines of telegraph wires or other electric conductors for telegraphic and telephonic communications and for electric illumination, to be placed under the pavements of the streets, avenues and public highways of the cities of New York and Brooklyn in the State of New York, and under the sidewalks of the streets and avenues of said cities."

Sec. 5 of the law of 1848 authorized such companies to construct their line, "along and upon any of the public roads and highways, or across any of the waters within the limits of the State, provided the same shall not be so constructed as to incommode the public use of said roads or highways or in-

juriously interrupt the navigation of said waters."

Sec. 2 of the Act of 1853, amended Sec. 5 of the law of 1848 by inserting the word "under" in Sec. 5, aforesaid.

Sec. 1 of an Act of 1881, provided that: "Any company or companies organized and incorporated under the laws of this State, or partly within and partly beyond the limits of this State, are hereby authorized, from time to time, to construct and lay lines of electrical *conductors underground* in any city, village, or town within the limits of this State, subject to all provisions of law in reference to such companies not inconsistent with this act; provided that such companies shall, before laying any such line in any city, village or town of this State, first obtain from the common council of cities, the trustees of villages or the commissioners of highways of towns, permission to use the streets within such city, village or town for the purposes herein set forth."

Within a few months after the incorporation of the company in 1882 said company procured from the Board of Aldermen of New York City the right to put its wires underground.

The company took no steps towards putting its wires underground until after the passage of the Act of June 13th 1885 (Sess. Laws, 1885, C. 499).

The Act of 1885 created the board of commissioners of electrical subways, and required all companies operating or intending to operate electric conductors in any city in the State to file with the board, maps and plans before constructing the conduits, and the Act of May 29th, 1886 (Sess. Laws, 1886

C. 503), required the several companies operating electric conductors in that State to pay the salaries and expenses of said board, making it applicable to companies organized *before* the passage of either of said acts as well as those organized afterwards.

The New York electric lines company undertook to excavate in the streets of New York for the purpose of putting down a conduit for carrying electric wires. The defendant Squire, who held the office of commissioner of public works (similar to defendant's office of street commissioner in this case) refused to permit the relator to put down such conduits or make such excavations. Thereupon the relator applied to the Court of Common Pleas in New York for a writ of *mandamus* against the commissioner of public works to compel him to issue a permit to relator (just as has been done in this case), claiming that inasmuch as relator was chartered by the State under a law which gave it the right to put down conduits and to do an electrical business, and was authorized by the Board of Alderman of the City of New York so to do before the passage of the Acts of 1885 and 1886, it had a contract with the State and the city which could not be impared by any subsequent law passed by either the State or the city (just as relator claims here).

The application was denied by the Court of Common Pleas on the ground that relator had not obtained the approval of the commissioners of electrical subways for that city of the plans and specifications prepared by it for the construction of its underground electrical system (just as respondent

here contends that this relator has not obtained such approval and permit from the Board of Public Improvements, *who, under the ordinance referred to, alone has power to grant such permit*).

The company appealed to the general term of the Court of Common Pleas where the judgment below was affirmed. Thereupon successive appeals were taken to the Court of Appeals and the Supreme Court of New York, which in turn affirmed the judgment of the lower court, and, finally, the case was taken by writ of error to the Supreme Court of the United States. And that court held that the Acts of 1885 and 1886 were constitutional both under the Constitution of New York and of the United States, saying: "*The State law of* 1885 *simply transferred the reserved police power of the State from one set of functionaries to another and required the company to submit its plans and specifications to the latter, who would determine whether they were in accordance with the terms of the ordinance giving it the right to enter and dig up the streets of the city, and being so construed it violates no contract rights of the company which might grow out of the permission granted by the municipality.*

The said Act of 1886 *comes within the principles settled in Charlotte, etc., Railroad v. Gibbs,* 142 *U.S.* 386, *and is not in conflict with the provision of the* 14*th Amendment that no State shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law.*"

This case was decided by the Supreme Court of the United States on the 2d of May, 1892, and fits

the case at bar exactly, covering every point contained in this contention of relator.

It is respectfully submitted that further argument or citation is useless on this branch of the case in view of this decision, and that this contention must be decided against relator, not only on the general principles of police power adjudicated by the case cited, *but also because the respondent in this case, the street commissioner of the City of St. Louis, under the provisions of the ordinance quoted, has no power to grant a permit to relator, but that the power is vested in the Board of Public Improvements of St. Louis, just as in New York it is vested in the Board of Commissioners of Electrical Subways and not in the Commissioner of Public Works.*

Respondent's Brief on Motion to Strike Out Parts of Respondent's Return.

I.

THE FOURTH DEFENSE INTERPOSED BY RESPONDENT IS THAT EVEN CONCEDING ALL THAT RELATOR CLAIMS WITH REFERENCE TO THE VALIDITY OF THE ACT OF MARCH 26TH, 1868, AND OF THE ACT OF MARCH 2D, 1857, NEVERTHELESS, RELATOR IS NOT ENTITLED TO THE RELIEF ASKED FOR IN THIS CASE, BECAUSE IT HAS NEVER BY ANY ACT BEEN GRANTED A FRANCHISE TO MAKE AND VEND ELECTRICITY FOR ANY PURPOSE WHATEVER, BUT THAT WHATEVER RIGHTS, PRIVILEGES AND FRANCHISES IT EVER ENJOYED, WERE CONFINED TO MAKING AND VENDING GAS, GAS LIGHTS, GAS FIXTURES AND ANY SUBSTANCE OR MATERIAL USED AS A SUBSTITUTE THEREFOR, AND THAT ELECTRICITY, WHETHER USED FOR LIGHTING OR POWER PURPOSES IS NOT A SUBSTANCE OR MATERIAL, AND HENCE RELATOR HAS NO RIGHT TO MAKE AND VEND THE SAME ANYWHERE.

THE RETURN FURTHER SHOWS THAT THE RELATOR HAS HERETOFORE PLACED ITS PIPES AND FIXTURES FOR DISTRIBUTING GAS BENEATH THE SURFACE OF THE STREET AT THE IDENTICAL POINTS IT NOW PROPOSES TO PUT CONDUITS FOR ELECTRIC WIRES, AND THAT IT HAS NEVER ACQUIRED FROM THE STATE OF MISSOURI, OR THE CITY OF ST. LOUIS ANY RIGHT TO PLACE SUCH WIRES ABOVE OR BENEATH THE STREETS OF SAID CITY.

Relator moves to strike out this defense on the following grounds:

FIRST. That it is immaterial and not responsive

to the averments in relator's petition, but is an attempt to tender a false and immaterial issue in respect to the rights and relief sought by relator; for as much as relator's charter gives it the right to lay down in the street all pipes, fixtures and other thing required in its business of making and vending gas, gas lights, gas fixtures and any substance or material which at the date of its charter was or thereafter might be used as a substitute therefor, "and especially the right which relator claims under its charter to lay down, under said streets, in pipes or conduits suitable therefore, wire by means of which to transmit currents of electricity for the production of electric light as a substitute for gas light."

Relator, further, assigning reason for the motion, says, "that it is a matter of common knowledge, and of which relator submits that the court will take judicial notice, that in making or producing gas light, by means of ordinary illuminating gas, the carbon which is a component part or element of such gas is brought to a condition of incandescence by the application of heat; and it is also a matter of common knowledge, and of which the court will take judicial notice, that in making or producing electric light, which for past years has been, and is now, largely used as a substitute for gas light, the carbon which is used for arc lights in the form of rods or pencils and for incandescent lamps in the form of a condition of incandescence by generating and transmitting through said carbon what is called electricity; the light or illumination produced in either case being, as is commonly known, the result

of the incandescent condition of the carbon used and the effect thereof upon the organs of sight."

This is not an immaterial matter, and the fact that it is not responsive to the averments of relator's petition makes no difference, inasmuch as respondent can set up any new matter, in a return to an alternative writ of *mandamus*, which will show that relator ought not to have the relief asked.

I further respectfully submit that this is not a matter of common knowledge of which the court can take any notice.

On the contrary, I assert that it is now the recognized fact, among all persons who have any knowledge on the subject, that the illumination produced by gas is due to the presence of incandescent particles of carbon or other substance or material in the flame, or at the place where combustion of the gas takes place:

I further submit that it is likewise the fact that the illumination produced in an electric light is due to the passage of a current of electricity through any substance or material placed in the circuit (of the current of electricity) thereof, and the energy of the current is resisted thereby to an extent that the energy expended is sufficient to render the resisting material or substance hot to a degree of incandescence, and that this is equally true of arc or incandescent lamps.

I further submit that it is likewise the fact that the use of carbon in an electric light is not necessary as the resisting material, but that other resisting materials, such as platinum, may be used for the same purpose and with the same effect, and

that carbon pencils are used simply on account of the cheapness thereof.

I further contend that gas must, necessarily, be distributed by means of pipes, and that the particles of carbon therein become ignited when coming in contact with flame; whereas electricity has no particles of carbon, in suspension, and can only be distributed by means of wires, and unless there is some resisting substance in the circuit there will be no electric light. Electricity, as is now universally known, is in no sense of the word, a substance or material. It is true, if it comes in contact with an inflammable substance, it will produce flame or light, but in itself it is neither flame nor light, neither is it a substance nor material.

These principles are fully recognized in all modern encyclopædias and in all works on the subject, and I specially refer the court to Oliver J. Lodge's work entitled "Modern Views of Electricity," 2d Ed. 1892, especially Sec. 149, p. 284, *et seq.*, and may be pardoned for quoting the following statement from the author: "It is not too much to say that a boy turning a handle could if his energy were properly directed, produce quite as much real light as is produced by all this mass of mechanism and consumption of material."

It is true that the carbon, platinum or other resisting substance is a material and is destroyed in producing light, but it is likewise true that no amount of carbon or platinum or other resisting substance can produce electric light without the aid of a current of electricity, and that the electric current is not a substance. It might as well be contended

that because artificial electricity is produced by dynamos or other means, and is produced in houses, and is transmitted by means of wires, that because the dynamos or the houses or the wires are a substance or material, therefore electricity is a substance or material. Man is a substance. It might as well, therefore, be said that because man is a substance his thoughts are a substance or material. Man produces thought, utters thought by means of speech, but neither the sound of speech nor the thought spoken is a substance. Exactly so is it with electricity. Aye, more, man is charged with electricity, gives off electricity,, but such electricity is not a substance or material. A substance or material is tangible. Electricity is not.

I submit, therefore, that it is not true, as stated by relator, that it is a matter of common knowledge that gas and electricity are, because produced by the operation of heat on carbon, therefore, the same thing, either in cause or effect.

I apprehend, however, that this court will not undertake to determine this question upon any such lines, but that it will leave it for further investigation and proof.

II.

THE FIFTH DEFENSE INTERPOSED BY RESPONDENT IS THAT IT IS PROVIDED BY SEC. 2721, OF ART. 5, OF CHAPTER 42, REV. STATS. 1889, THAT NO COMPANY SHALL PLACE ITS WIRES OR OTHER FIXTURES UNDERGROUND IN ANY CITY UNLESS IT SHALL FIRST OBTAIN CONSENT FROM SAID CITY, THROUGH THE MUNICIPAL AUTHORITIES THEREOF.

Relator moves to strike out this defense because Sec. 2721 applies only to telegraph and telephone companies.

It is true that Sec. 2721 is a part of Art. 5 of Chap. 2 of the Revised Statutes 1889 in reference to telegraph and telephone companies, but respondent contends it is a part of the policy of the law in this State, begun in 1875, to vest in the municipalities of the State the right to regulate the use of the streets of such cities. It was formerly held to be the law that the title to all the highways in the State was vested in the State, notwithstanding the State paid no part of the cost of condemning and acquiring the same in the cities, and paid nothing toward maintaining the same, but, on the contrary, the cities were held liable for any injuries received on account of the highways being out of repair. This, however, has now been changed. Sec. 20 of Art. 12, of the constitution of 1875 prohibits the legislature from granting any right to construct and operate a street railroad in any city or on any public highway without the consent of the local authorities having control of the street or highway proposed to

be occupied. And also prohibits the transfer of such franchise without similar assent first obtained. Par. 2, of Sec. 26, of Art. 3, of the charter of the City of St. Louis (adopted by virtue of the authority conferred by Secs. 20 to 25, of Art. 9, of the constitution of 1875), gives the city the power "to establish, open, vacate, alter, widen, extend, pave, * * * all streets, avenues, sidewalks, alleys, wharves, and public grounds and squares, and to regulate the use thereof."

Thus the constitution prohibits the legislature from authorizing street railroads to be constructed and operated over the streets of a city without the consent of the city. Sec. 2721, Revised Statutes 1889, prohibits telegraph and telephone companies from placing their wires along, across or under the streets of such cities, without the consent of the city, and the charter of the City of St. Louis grants it the power to regulate the use of its streets. Taken together, it expresses the policy of the State to vest the power in the city or locality to control the use of the highways which have been acquired and are maintained and kept up at the expense of the locality, and all tends to prove the correctness of respondent's contention that no company has the right to use the streets of a city for private or *quasi* public purposes, without the consent of the locality or the city.

This conclusion was reached by the Supreme Court of the United States in the case of the City of St. Louis v. the Western Union Telegraph Company, 148 U. S. 92. On rehearing 149 U. S. 465.

If I am correct in this, it follows that relator's motion to strike out this defense should be overruled.

III.

THE SEVENTH DEFENSE INTERPOSED BY RESPONDENT IS THAT ON THE 2D OF MARCH, 1857, LIGHTING BY ELECTRICITY WAS WHOLLY UNKNOWN TO ART AND THAT THE GENERAL ASSEMBLY OF MISSOURI, BY THE ACT OF MARCH 2D, 1857, DID NOT, AND DID NOT INTEND TO CONFER UPON RELATOR, THE RIGHT TO MANUFACTURE AND VEND ELECTRICITY FOR LIGHTING PURPOSES.

Relator moves to strike out this defense as immaterial and irrelevant and as constituting no defense to the alternative writ; because it appears from the Act of March 2d, 1857, by the 5th section thereof, that relator was expresssly granted the right and privilege of making and vending gas, gas lights, gas fixtures and any substance or material that might then or thereafter be used as a substitute therefor, without annexing to such right any condition that such substitute should be only such as was known to art at the date of the approval of the act.

This concedes, as is the historical fact, that lighting by electricity, was wholly unknown to art in 1857. Unless, therefore, the Act of 1857, is by its terms, clearly and without doubt, broad enough to grant to relator rights and privileges which were wholly unknown to mankind, including relator and the legislature, at the date of the act, relator has no right to manufacture or vend electricity. The act in terms grants the right to manufacture and vend gas, gas lights, gas fixtures and any substance or material that might be used as a substitute therefor. Let it be particularly and especially noted that the

language of the act is not that relator is granted the right to manufacture and vend anything that may be used as a substitute for gas, but its right is restricted to the manufacture and vending of any *substance or material* which might be used as a substitute for gas. Gas is a substance or material. Electricity is neither. By the letter of the act, therefore, the right to manufacture and vend electricity is not granted. There is nothing in the context which would justify the contention that electricity was intended to be included in the grant of power. Inasmuch as lighting by electricity was unknown at that time, it cannot be said that it was the spirit or purpose of the legislature to grant the right to do that which was wholly unknown. I construe the grant, and the words "substance or material" employed therein, to mean just what it says, that is, gas or some other substance or material, like coal oil, candles or any substance or material producing light, but I cannot conceive that a legislature can be said to have granted rights of which both the legislature and the grantee and the whole world were ignorant at the time of the grant.

IV.

THE EIGHTH DEFENSE IS THAT LIGHTING BY ELECTRICITY WAS WHOLLY UNKNOWN TO ART ON THE 26TH OF MARCH, 1868, AND THEREFORE, THE LEGISLATURE DID NOT, AND DID NOT INTEND TO, CONFER UPON RELATOR, BY THE ACT OF 1868, THE RIGHT TO MANUFACTURE AND VEND ELECTRICITY FOR LIGHTING PURPOSES.

Relator moves to strike out this defense because it is immaterial and irrelevant and constitutes no defense, and, further, because the Act of 1868 granted relator the right to make and vend gas, gas lights or gas fixtures or any substance or material that might then, or thereafter, be used as a substitute therefor, without annexing to such right any condition that such substitute should be only such as was known to art at the date of the approval of said act; and, further, because the Act of 1868 confirmed to relator all the rights and privileges conferred upon it by the 5th section of the Act of 1857.

In this connection, it is important to note that the Act of 1868 confers no rights, privileges or franchises upon relator whether to manufacture gas or any substance or material that might be used as a substitute therefor nor to manufacture electricity at all. The act is not a complete act. It is not an amendment by implication. An amendment by implication must be a complete act in itself. If it is not; and if reference must be had to some other act to understand what was intended, then it is an

amendment to such other act, contrary to Sec. 25 of Art. 4 of the Constitution of 1865, and cannot be said to be a new law which by implication, supersedes and takes the place of a prior law.

The Act of 1868 is by itself wholly unintelligible as to the rights, privileges and franchises granted. In express terms it refers to the rights, privileges, and franchises granted by the 5th section of the act to which it is amendatory, thereby in terms calling it an amendment of the Act of 1857, and not an original legislative enactment, complete in itself, and intelligible without reference to any other act.

For these reasons it can be correctly stated that the Act of 1868 did not intend to confer any rights which were not conferred by the Act of 1857, and inasmuch as lighting by electricity was unknown to art in 1857, it is wholly immaterial to this inquiry whether it became known to art between 1857 and 1868, and what has been said above, in regard to the seventh defense, applies equally here.

Aside from this the motion admits that lighting by electricity was also unknown to art in 1868, and therefore what has been said in regard to the meaning of the term "substance or material" equally applies here.

Stare Decisis—Res Adjudicata.

To parry the force of respondent's contentions, relator insists that the Act of March 26th, 1868, has been adjudicated three times by the Supreme Court of Missouri, in the cases of St. Louis v. St. Louis Gas Light Co., 70 Mo. 69; St. Louis Gas Light Co. v. St. Louis, 86 Mo. 495, and State *ex rel.* City of

St. Louis v. Laclede Gas Light Company, 102 Mo. 473, decided respectively in 1879, 1885 and 1890; and that, on the faith of these judgments, certainly since 1890, great sums of money have been invested in the stock and securities of the company, contracts have been made and duties and obligations incurred which would now become worthless if the perpetuity of relator's charter is open to investigation or further decision.

A reference to the first case quoted (70th Mo. 69) fails to show that the Act of 1868 was referred to either in the briefs of counsel for either party to the suit, or in the opinion of the majority of the court, or in the minority opinions, or in the opinion on re-hearing. Inasmuch as the Laclede Gas Light Company was not a party of record in that case in the Supreme Court of Missouri, the question of the effect of the Act of 1868 was not before the court, and consequently could not be passed on by the court.

The second case referred to (86th Mo. 495) was a suit against the city to recover an amount alleged to be due the gas company from the city under a contract between the two. In this case the effect of the Act of 1868 upon section 6 of the Act of March 2d, 1857, is referred to, but none of the propositions involved in this case were raised, passed upon or adjudicated in that case.

The last case referred to (102d Mo. 472) was an original proceeding by *mandamus* in the Supreme Court of Missouri at the relation of the City of St. Louis against the Laclede Gas Light Company, to compel it to comply with the provisions of ordi-

nance 15,482, approved March 31st, 1890, whereby the city undertook to fix the price which the Laclede Gas Light Company might charge for gas furnished to the people of St. Louis. The Supreme Court held that inasmuch as the charter of the Laclede Gas Light Company did not fix the price it should charge for gas, the city had no power under its charter to regulate the matter. The questions raised and relied on by respondent in this case were not discussed or adjudicated.

A careful, or even a casual, examination of these three cases, therefore, fails to show that the Supreme Court of Missouri has ever adjudicated any of the propositions involved in this litigation, and all of the contentions of respondent with regard to the impairment of its bonds and stocks and contracts, therefore, dissipates like mist before the sun.

Conclusion.

The magnitude and importance of this case cannot be overstated. I believe that there has never been a case before this court since its organization, nor in fact any case before any court that ever was constituted, that involves as much in dollars and cents, or as much in baneful effects and consequences upon a municipality as the case at bar. If relator's contentions are true and are upheld by this court, there can be no money value placed upon its franchise. It stands in a class to itself. No other corporation in America would have as valuable a franchise. Moreover, it would be greater than the City of St. Louis, or the State of Missouri, itself. It would have a right not only to occupy as much of the streets, alleys and public places of the city above and below the surface thereof as it desired for its own use, but it would have the right to farm out to other persons, upon such terms as it saw fit, equal rights.

The people of the City of St. Louis, whose money bought the streets and keep the same in repair, would be powerless. The relator would be the greatest monopoly the world has ever known, not only from a business standpoint, but also from the standpoint of exercising and granting the powers of a sovereign over the highways of the city, without even being subject to the police regulation of inspection, and the city would have to stand supinely

by and see its streets dug up and marred at will without having power to require them to be properly replaced, and in addition would have to pay the damages occasioned to persons traveling over the same by reason of their being in a defective and dangerous condition.

It is confidently submitted to the court—this, the people's highest court—that no such calamity will be allowed to come upon us, if there is any legal method of preventing it, and that the defenses interposed by the respondent are each and all good, sufficient and complete defenses to the claims set up by relator, and hence that the demurrer and motion to strike out parts of respondent's return should both be overruled.

The Supreme Court of Missouri decided only the question of the sixth defense interposed by respondent, to-wit: that the ordinance regulations of the City of St. Louis, requiring relator to obtain a permit from the Board of Public Improvements before putting down any wires, tubes, cables, etc., was legal and constitutional, but did not decide whether the Act of 1868 was in conflict with Paragrah 2, of Section 1, of Article 8, of the Constitution of Missouri, nor whether it was in conflict with Section 25, of Article 4, of the Constitution of Missouri, 1865, nor whether relator's charter expired on the 2d of March, 1887, nor whether said charter will expire in 1917, nor whether said charter is a perpetual charter; neither did it decide whether, if relator's charter is still alive and valid, the relator has the right to manufacture and sell electricity; nor whether,

if relator has such rights itself, it can exercise such rights, and at the same time delegate to others a like privilege to exercise the same rights at the same time.

There can be no end to this litigation until these questions are decided. It is much to be regretted that the Supreme Court of Missouri did not pass upon them. Counsel for both sides urged that court to settle these questions, and on behalf of the defendants in error I here earnestly petition this Honorable Court to adjudicate these questions and set at rest these controversies. Until they are settled, the City of St. Louis must suffer. No definite policy can be adopted by the municipal authorities with reference to conduits, gas lighting, or electric lighting in the city until we know whether the city has the right to regulate the use of its own streets, or whether the Laclede Gas Light Company has a perpetual charter and the right to put down its conduits and lay its wires whenever and wherever it chooses, and also to delegate to other persons the same rights to be exercised at the same time. It is not too much to say that the City of St. Louis is far behind other cities of equal population in these respects, because our powers are clouded by the questions which have been raised in this case, and we must so remain, bringing up the rear of the procession of progress in municipal matters, until there has been an authoritative declaration by this court on these propositions. I apprehend that neither party would be satisfied with a decision from any tribunal in the United States inferior to this Honorable Court.

With all the earnestness at my command, I therefore respectfully urge this Honorable Court to pass on all the questions raised in this case.

Respectfully submitted,

W. E. Marshall

Attorney for Defendants in Error.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

STATE OF MISSOURI EX REL. LACLEDE GAS LIGHT COMPANY,
Plaintiff in Error.

vs.

M. J. MURPHY, STREET COMMISSIONER, AND THE CITY OF ST. LOUIS,
Defendants in Error.

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MOTION OF DEFENDANTS IN ERROR TO ADVANCE CAUSE.

W. C. MARSHALL,
Attorney for Defendants in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

STATE OF MISSOURI EX REL. LACLEDE GAS LIGHT COMPANY,
Plaintiff in Error,

vs.

M. J. MURPHY, STREET COMMISSIONER, AND THE CITY OF ST. LOUIS,
Defendants in Error.

MOTION OF DEFENDANTS IN ERROR TO ADVANCE CAUSE.

The above named defendants in error respectfully move this Honorable Court to advance this cause, and set the same for hearing at as early a day as the convenience of the court will permit, and defendants in error here show unto the court, as special reasons for this motion, as follows:

FIRST: The general nature of this litigation is this: The plaintiff in error seeks, by *mandamus*, to compel the defendants in error, to permit it to lay down and construct conduits in any and all of the streets of the City of St. Louis, it may so elect,

without first submitting plans and specifications showing the route and the manner of construction, insulation, etc., to the Board of Public Improvements, and getting the sanction of said Board, before the work is commenced, as the ordinances of the City of St. Louis require all persons to do.

Plaintiff in error claims that it is not bound, by the provisions of the city ordinances in this regard, because, under the Act of March 3d, 1857, incorporating the Laclede Gas Light Company, and the act amendatory thereof, approved March 26th, 1868, it acquired from the State of Missouri a right so to construct conduits and string wires therein, which antedates and is paramount to the ordinance provisions of the City of St. Louis, and that the city ordinance therefore impairs the obligation of its contract with the State, and hence is void under Section 10 Art. I of the Constitution of the United States.

Defendants in error claim that the ordinance is a legitimate exercise of the police power conferred on the city by the State of Missouri, and that it in no wise impairs the contract between the State of Missouri and plaintiff in error, as contained in the several acts of incorporation of said company.

Defendants in error further claim that the charter of plaintiff in error has expired by limitation, and that plaintiff in error, therefore, is not entitled to further carry on any business.

The City of St. Louis has, by ordinance, created a Board of Subway Commissioners, who have been at work for more than two years trying to solve the problem of the removal of wires from above the

surface of the streets, and to cause them to be placed in conduits. This has become an absolute necessity for the protection of life and property in this city.

Among the problems presented to said commissioners, is first, whether the city should construct one conduit, large enough to accommodate all the wires of all the companies, telegraph, telephone, electric light, etc., now using the streets of the city, or, second, whether the city will permit some third person to construct such a conduit and to lease out space to all wire-using companies, or third, whether it will grant to each company permission to construct its own conduit.

Plaintiff in error claims the right to construct conduits wherever, and in whatever part of the streets of the city it chooses.

No definite conclusion can be reached by the city until this alleged right of plaintiff in error has been adjudicated by this Honorable Court. The decision of plaintiff's claim will enable the city to determine which of the three courses, above indicated, will be adopted, but as long as the claim of plaintiff in error remains undecided, the city can do nothing. Especially in the business districts of the city, where the buildings are very tall, and consequently fires are more difficult to control, the streets of the City of St. Louis are now covered by a network of wires and cables, amounting, on some streets, to hundreds and even thousands. This condition makes it dangerous to property and also to pedestrians passing along the streets, and this danger is daily increasing, and makes the burying

of these wires absolutely necessary. Until a decision is reached in this case, no definite action can be taken by the city on this subject.

Therefore, defendants in error earnestly pray this Honorable Court to grant this motion, and to set this cause for hearing at as early a day as possible.

Respectfully submitted,

W. C. MARSHALL,

Attorney for Defendants in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 306.

THE STATE OF MISSOURI EX REL. THE LACLEDE GAS-LIGHT COMPANY, PLAINTIFF IN ERROR,

vs.

MICHAEL J. MURPHY, STREET COMMISSIONER, ETC., DEFENDANT IN ERROR.

MOTION TO ADVANCE, BY DEFENDANT IN ERROR.

Now comes said defendant in error and respectfully moves this honorable Court to advance the above-entitled cause for hearing at as early a day as the convenience of the Court will permit, and for grounds and reasons for this application defendant in error respectfully shows unto the Court as follows:

1. This is a proceeding by mandamus to compel the street commissioner of the city of St. Louis to grant relator a per-

mit to construct a conduit for the carrying of its electric wires under the streets of the city, the claim being asserted by relator that under its charter, granted by the State of Missouri, it has an absolute right to place its pipes, wires, and fixtures under any street or public place in the city, subject only to the limitations that it shall be done with as little inconvenience to the public as possible, and that it shall be done as expeditiously as possible. The city claims, under its charter and under its general police powers, that it has the right to regulate the use of its streets; that no person or company has a right to tear up its streets without its permission or, at least, without notice to it, and that relator has neither applied for nor obtained such permission nor given such notice.

2. Prior to the beginning of this litigation and ever since the city has been endeavoring to cause all electric wires to be placed under ground. The streets are very narrow in the business part of the city, generally only sixty feet wide, which, with a twelve-foot sidewalk on each side, leaves only thirty-six feet of roadway, and of this the street-car tracks take up sixteen feet. This leaves only twenty feet for other purposes—that is, ten feet on each side of the street. The city has endeavored to reserve one side of the street for public sewers, water pipes, and like purely public uses. The other side of the street it is willing shall be used by telegraph, telephone, electric-light, heat, and power companies, and such like quasi-public uses.

3. Last July the city adopted a general ordinance allowing and requiring all electric wires to be put under ground

in the business part of the city, and requiring all companies to file applications, with plans and specifications showing the space desired.

Eighteen companies have applied for such space.

This would require more than the ten feet on one side of the street if each was given a separate conduit, so that it is necessary to group them, regard being had to the character of the currents used, whether high tension or low tension.

This does not include the relator's claims.

If the city should proceed now to allot space to the eighteen companies that have applied therefor, and if this honorable Court should afterwards hold that relator is entitled to conduits, there would be no space under the street for it, except on the side of the street reserved for public uses, like sewers and water pipes.

This would most seriously hamper and injure the public uses of the streets.

Whereas if the city could know now that it would have to grant relator space, it could so arrange the conduits on the quasi-public side of the street and so group the other eighteen applicants as to leave space enough for relator and not interfere with the side of the street reserved for public uses.

4. There are now upon the streets in the business center of the city as many as four hundred, and in a few cases as many as six hundred, wires on a street.

This has made them exceedingly dangerous to life and property. Some of them carry currents that will cause and have caused instant death to pedestrians, when the wires break and fall onto the street, and the multiplicity of wires

makes it impossible to raise fire-ladders or water-towers with which to fight fires, and with the modern practice of constructing buildings ten, twelve, and sixteen stories high, these wires present a constant menace to all property in such district.

5. The work of constructing conduits can only be carried on during moderate weather. In our cold climate such work cannot be done in the winter. The eighteen applicants aforesaid are ready to begin work this spring. Our city engineers cannot assign them space until they know what provision, if any, is to be made for relator.

For these reasons, if this case is not heard until next October, it will delay all action by the city looking to the burying of these dangerous wires for another year.

Defendant in error therefore earnestly prays the Court to give this case an early setting, with the hope that it may be disposed of before the season for building conduits expires this year.

Respectfully submitted.

W. C. MARSHALL,
Counsel for Defendant in Error.

MISSOURI, *ex rel.* LACLEDE GAS LIGHT COMPANY *v.* MURPHY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 47. Argued March 1, 2, 1898. — Decided April 11, 1898.

The Supreme Court of Missouri having held that the act of the legislature of that State incorporating the Laclede Gas Light Company and conferring upon it the sole and exclusive privilege of lighting the streets in parts of St. Louis, though construed to include the right to use electricity for illuminating purposes in respect to such right, was taken subject to reasonable regulations as to its use, and that the power to regulate had been delegated to the city of St. Louis, and that under its general public power the city had the right to require compliance with reasonable regulations as a condition to using its streets for electric wires, this court concurs with the conclusion of the Supreme Court that the company was subject to reasonable regulations in the exercise of the police powers of the city, and holds that, so far as that involved any Federal question, such question was correctly decided.

If the company, as it asserted, possessed the right to place electric wires beneath the surface of the streets, that right was subject to such reasonable regulations as the city deemed best to make for the public safety and convenience, and the duty rested on the company to comply with them.

If requirements were exacted or duties imposed by the ordinances, which, if enforced, would have impaired the obligations of the company's contract, this did not relieve the company from offering to do those things which it was lawfully bound to do.

The exemption of the company from requirements inconsistent with its charter could not operate to relieve it from submitting itself to such police regulations as the city might lawfully impose; and until it had complied, or offered to comply, with regulations to which it was bound to conform, it was not in a position to assert that its charter rights were invaded because of other regulations, which, though applicable to other companies, it contended would be invalid if applied to it.

The Supreme Court of Missouri did not feel called on to define in advance what might, or might not, be lawful requirements; and there is nothing in this record compelling this court to do so.

On a writ of error to a state court this court cannot revise the judgment of its highest tribunal unless a Federal question has been erroneously disposed of.

The Laclede Gas Light Company filed its petition for mandamus in the name of the State of Missouri, on its relation,

against Michael J. Murphy, street commissioner of the city of St. Louis, on November 26, 1894, in the Supreme Court of that State.

This petition stated that the relator was incorporated by an act of the general assembly of Missouri, approved March 2, 1857, which was amended by an act approved March 3, 1857, and by an act approved March 26, 1868; and set forth the three acts *in extenso*.

The fifth section of the act of March 2, 1857, read as follows:

"§ 5. The said company, its successors and assigns, shall, within all that portion of the present corporate limits of the city of St. Louis, in St. Louis county, not embraced within the corporate limits of said city, as established by the act entitled 'An act to incorporate the city of St. Louis,' approved February 8, 1839, have and enjoy, during the continuance of this act, the sole and exclusive privilege and right of lighting the same, and of making and vending gas, gas lights, gas fixtures, and of any substance or material that may be now or hereafter used as a substitute therefor; and to that end, may establish and lay down, in said portion of said corporate limits, all pipes, fixtures or other thing properly required, in order to do the same, (the same to be done with as much dispatch and as little inconvenience to the public as possible,) and shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company."

The words "sole and exclusive" in the fifth section were stricken out by the act of March 3, 1857. Laws Missouri, 1856–57, pp. 598, 599.

Section one of the act of March 26, 1868, (amending the act of March 2, 1857,) was as follows:

"SECTION 1. The said Laclede Gas Light Company shall and may, within the corporate limits of the city of St. Louis, as the same are now or may hereafter be established, exercise, have, hold and enjoy forever all the rights, privileges and franchises granted to it by the fifth section of the act to which this act is amendatory, and may, at any time, lease, sell or dispose of any portion of said rights, privileges and

franchises to individuals, associations or corporations intending or desiring to exercise the same within any portion of the limits aforesaid." Laws Missouri, 1868, p. 187.

The petition then averred that the act of March 2, 1857, as amended by the subsequent acts, constituted relator's charter, by which relator was granted the privilege and right of lighting the city of St. Louis as in the acts set forth; "and to that end may establish and lay down in any portion of said corporate limits all pipes, fixtures or other thing properly required in order to do the same, with this limitation only, that in laying down pipes, fixtures or other thing properly required therefor relator shall do the same with as much dispatch and as little inconvenience to the public as possible."

It was further stated that by a certain agreement, executed February 28, 1873, relator had "abandoned and surrendered any and all exclusive rights and all claims or pretences of claims of sole or exclusive privilege or right of lighting any part of the city of St. Louis with gas, or making or vending gas, gas lights or gas fixtures, and also all exclusive right whatsoever under its said charter."

The petition went on to say that in pursuance of its charter relator had been for a long time engaged in the lighting business, both by gas and electricity; that under a contract with the city it was lighting a part of the public streets and alleys by electricity, and would be obliged to do so for some years to come; that it was furnishing light by means of gas or electricity to a large part of the inhabitants of the city; that in order to fulfil its obligations to the city and the public the company had erected and was maintaining "extensive and costly plants for the manufacture and distribution of gas as well as for generating and distributing electric currents;" that for distributing gas it had constructed a system of pipes laid under ground, without objection; that for the distribution of electricity it had "hitherto used overhead wire strung upon poles along the streets and alleys of said city," which poles and electric wires had been and are maintained and used by relator without objection by said city or the authorities thereof for the distribution of electricity, as well to furnish

light to private consumers as for the fulfilment by relator of its said contract with said city of St. Louis for the lighting by electricity of certain public streets and alleys thereof; that to effect such distribution it is necessary to transmit through and by means of said wires electric currents of great power, which if and when accidentally diverted are dangerous to human life and property; that in order to avoid the inconvenience and danger to the public necessarily incident to that method of distributing electric currents, and in order to provide more effective and proper service relator has made arrangements to lay its wires underground along and under the streets of said city according to approved and practicable plans, and is now ready to do so with as much dispatch and as little inconvenience to the public as possible.

It was then stated that Murphy was street commissioner, to whom was committed, under the city charter, "the supervision and control of the streets and alleys of said city and the enforcement of city ordinances relating thereto." And relator averred that, having completed its preparation to carry out the work above indicated, and having given notice to the street commissioner of its intention to do so, the company proceeded, on the 30th day of October, 1894, to begin the work of excavating at a point on the east side of Broadway street in St. Louis, near the corner of Mound street, that point being adjacent to its generating plants, which work was proper and necessary for placing wires under ground, when the street commissioner caused the work to be stopped, and notified relator "that he would not allow any part of any street of said city to be excavated for any purpose whatever without a permit previously obtained from him for that purpose, as provided by ordinance; and relator states that by section 568, article I, chapter 15, of the Revised Ordinance, 1887, of said city of St. Louis, it is provided that 'no person shall make or cause to be made any excavation on any public street, highway or alley without written permission of the street commissioner so to do, excepting public work under the authority of the water or sewer commissioner, who at the time of ordering any such excavating shall notify the street commissioner of the same.'"

Statement of the Case.

That upon being so notified the company applied to the street commissioner for a permit to make the necessary excavation on Broadway, so that it might place its wires under the street for the purposes indicated. That the officer refused to give the permit asked, whereby, it was alleged, the company, in the exercise of its vested rights, was prevented from laying down in the streets of the city the pipes and fixtures required in the conduct of its business.

That it was the duty of the street commissioner to grant the permit; and, being without other remedy, relator prayed a mandamus against that officer, commanding him to issue a permit to the company to make an excavation along the east side of Broadway street, as near the curb as practicable, and extending from the southeast corner of Mound street to the southeast corner of Olive street and Broadway, in so far as was necessary for the laying of the company's electric wires under ground, "the same to be done with as much dispatch and as little inconvenience to the public as possible."

An alternative writ of mandamus having been issued, the street commissioner filed his return thereto, alleging therein that the act of March 26, 1868, was in conflict with paragraph 2 of section 1 of article VIII of the constitution of Missouri of 1865, because the company did not, within one year from the time the act of March 2, 1857, took effect, organize or commence the transaction of its business; and not until 1873; and that said act was in conflict with Sec. 25, Art. 4, of the constitution of Missouri, because it did not set forth the act or part of act amended at length as if it were an original act or provision.

That relator had never by any act been granted the franchise to make and vend electricity for any purpose whatever; and that lighting by electricity was wholly unknown March 2, 1857, and March 26, 1868.

"That the relator has heretofore placed its pipes and fixtures beneath the surface of the street on the east side of Broadway, from Mound street to Olive street, and at divers and sundry other places beneath the surface of the streets of the city of St. Louis, for the purpose of transmitting and

Statement of the Case.

vending and supplying gas to consumers in the city of St. Louis; that in order to convey electricity it is necessary to carry the same by means of wires strung on poles above the surface of the streets or by means of wires strung in non-conductive tubes or conduits beneath the surface of the streets, and that relator has never acquired from the State of Missouri or the city of St. Louis any right to place such wires above or beneath the streets of said city.

"That it is provided by sec. 2721 of art. 5 of chap. 42, Rev. Stats. 1889, that no company shall place its wires and other fixtures under ground in any city unless it shall first obtain consent from said city, through the municipal authorities thereof.

"And that it is provided by art. 2, chap. 15, Rev. Ordinance of the city of St. Louis, 1887, as the same has been amended by Ordinance No. 16,894, that no wires, tubes or cables conveying electricity for the production of light, heat or power shall hereafter be placed along or across any of the streets, alleys or public places in the city of St. Louis by any person, corporation or association not having, previous to the passage of this ordinance, accepted and complied with Ordinance No. 12,723, now amended, or shall be duly authorized by the municipal assembly, and then only upon condition that such person, corporation or association so authorized by ordinance, before placing its wires, tubes and cables under ground, shall file in the office of the board of public improvements an application therefor, stating in detail the streets, alleys or public places which said wires, tubes or cables are to occupy, and the manner in which said wires, tubes or cables are to be secured or supported and insulated, together with a plat showing the route of such wires, tubes and cables, and that thereupon, if the same is approved, the board of public improvements shall grant a permit therefor, subject to such restrictions, regulations and qualifications as may be prescribed by said board, and all such work shall be done under the supervision of and to the satisfaction of the supervisor of city lighting; and that whenever an alley is available for placing such wires, tubes or cables, the same shall be placed in or under alleys and not

along or under streets; that relator has never accepted the provisions of said article and chapter, nor of said Ordinance No. 16,894, nor has it ever been authorized by the municipal assembly of St. Louis to place its wires, tubes and cables under the streets or alleys of St. Louis.

"Respondent further shows unto the court that said ordinance provisions are legal and binding and valid provisions, and such as the city of St. Louis had the right to adopt and enact under par. 2 of sec. 26 of art. 3 of the charter of St. Louis, which gives said city the power to regulate the use of all streets, avenues, alleys and so forth in said city, and such ordinance provisions are legal enactments, notwithstanding any rights which relator now has or may heretofore have had, by virtue of any act of the general assembly of the State of Missouri.

"Respondent further shows unto the court that relator has never made application to the board of public improvements for a permit to place its wires, tubes and cables under ground in said city, nor has it complied in any manner with any of the ordinance provisions aforesaid, and that respondent has not the power to grant any such permit as is asked for by relator in this case."

The relator moved to strike out certain portions of the return, and demurred to certain other portions thereof, assigning, among other grounds, that its "charter was and is a contract between the State of Missouri and said corporation, not subject to alteration, suspension or repeal except with the consent of said corporation, and that any constitutional provision, law or municipal ordinance adopted or enacted after said date, by or by authority of said State or by any municipality thereof, inconsistent with any right, privilege or franchise granted by said charter to relator or the effect of which would be to deny to relator any such right, privilege or franchise, or to annex to the full exercise thereof by relator any condition or requirement not prescribed by said charter, would be in contravention of section fifteen of article II of the constitution of Missouri, 1875, forbidding the general assembly to pass any law impairing the obligation of contracts, and

also of section 10 of Article I of the Constitution of the United States, forbidding any State to pass any such law."

That "the provisions of said ordinance of said city of St. Louis in said portion of said return mentioned, if held valid or binding upon relator, would necessarily impair the obligation of the contract between relator and said State of Missouri, contained in said charter, by annexing to the exercise by relator of the rights and privileges by said charter granted to it certain conditions and requirements not prescribed by said charter, and which it does not appear nor is by respondent averred that the relator has ever consented to or accepted."

On the issues thus presented, the Supreme Court heard the cause and denied the peremptory writ.

Subsequently on the application of relator the judgment was set aside; the demurrer to the return and motion to strike out parts thereof were overruled; and leave was given to plead over.

Relator thereupon filed a traverse to the return, setting forth at length the grounds on which relator denied that the averments in the return in respect of the organization of the company and of the time when it commenced the transaction of business, and of the invalidity of the act of March 26, 1868, constituted defences to the proceeding.

The traverse further stated that if electricity was not a substance or material as averred by respondent, which relator denied, that constituted no defence. That relator was incorporated to carry on the business of lighting the city of St. Louis, and the right and privilege of doing so was granted, as before set forth and reiterated. The traverse explained the process of lighting by gas, and also by electricity, which relator asserted was included in the grant; admitted that the company had theretofore exercised its corporate franchise of lighting the city with gas through pipes laid beneath the surface of the street on the east side of Broadway from Mound street to Olive street, and in other places; that to furnish light by means of electricity it was necessary to use wires "either on poles above the surface of the street, as relator is

now doing under a contract with said city of St. Louis, or in tubes or conduits beneath said surface;" and that "its purpose in making the excavation on Broadway mentioned in the petition was to construct and place under ground a conduit for wires, such conduit and wires being properly required for the production of electric light as a substitute for gas light;" and set forth that the conduit and wires so intended to be laid down were of the most approved description, offering no obstruction, and avoiding the danger to life and property attending the use of overhead electric wires.

The traverse denied that relator had not acquired the right to place such wires above or beneath the streets; and denied that section 2721 of article V, chapter 42, Revised Statutes of Missouri, 1889, applied to relator, but averred that if it did, its provisions would be invalid as impairing the obligation of the contract contained in its charter.

The traverse admitted that by article two, chapter fifteen, Revised Ordinance of St. Louis of 1887, as amended by Ordinance No. 16,894, the municipal authorities undertook to prescribe certain conditions for placing wires, tubes or cables conveying electricity along, across or under the streets and alleys of the city; and averred that said ordinance and the amendatory Ordinance No. 16,894 are the same ordinances revised and reënacted in article II of chapter 15 of the Revised Ordinance of 1892, by an Ordinance No. 17,188, approved April 7, 1893, and that sections 603 to 614 are the only provisions prescribing regulations or conditions in respect of placing along, across or under any of the streets, alleys and public places of wires, tubes or cables conveying electricity for the production of light, heat or power, and are the provisions insisted on by respondent. These sections were set out in the traverse and are printed in the margin.[1]

[1] § 603. That no wires, tubes or cables conveying electricity for the production of light, heat or power shall hereafter be placed along or across any of the streets, alleys or public places in the city of St. Louis, by any person, corporation or association not having, previous to the passage of this ordinance, accepted and complied with ordinance number twelve thousand seven hundred and twenty-three, now amended, or shall be duly

The traverse then proceeded:

"Relator denies that the requirements of said city ordinances set forth were or are legal and binding and valid provisions so far as the rights of this relator under its charter

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authorized by the municipal assembly, and then only as hereinafter provided.

§ 604. All such wires, tubes or cables, along or across any of the streets, alleys or public places of the city of St. Louis, shall be placed at such distances above or below the surface of the ground, and secured in such manner as shall be prescribed by the board of public improvements.

§ 605. That any person or persons, corporation or association, duly authorized by ordinance to do business in the city of St. Louis, and desiring to place along or across any of the streets, alleys or public places of the city of St. Louis, such wires, tubes or cables, shall file in the office of the board of public improvements an application therefor, stating in detail the streets, alleys or public places which said wires, tubes or cables are to occupy, and the manner in which said wires, tubes or cables are to be secured or supported and insulated, together with a plat showing the route of such wires, tubes or cables.

§ 606. The board of public improvements is hereby authorized, upon the filing of the application and plat required by the preceding section, to grant a permit for such occupancy of the streets, alleys and public places herein named, with such restrictions, regulations and qualifications as may be prescribed by said board, and under the supervision and to the satisfaction of the supervisor of city lighting.

§ 607. That in case any person or persons, corporation or association, duly authorized by ordinance, desiring to place along or across any of the streets, alleys or public places of the city of St. Louis, such wires, tubes or cables, shall, with the application and plat heretofore provided for, file in the office of the board of public improvements the written consent of any telegraph or telephone company, or any other electric light or power company, doing business in the city of St. Louis, to the placing of such wires, tubes or cables upon the poles of said telegraph, telephone, electric light or power company, situated in the streets, alleys or public places named in such application, the board of public improvements is hereby authorized to grant a permit for such occupancy of the poles of such telegraph, telephone, electric light or power company, with such restrictions, regulations and qualifications as may be prescribed by said board, and under the supervision and to the satisfaction of the supervisor of city lighting.

§ 608. That whenever an alley is available for the placing of poles for the support of such wires, tubes or cables, the board of public improvements will advertise for five days previous to a day set for hearing objections or arguments in favor of placing the said poles in the alley. If, after due consideration, the board of public improvements are of the opinion

were or are concerned, and denies that as against this relator said city of St. Louis had or has the lawful right or power to adopt or enforce the same, whether under the provisions of paragraph 2 of section 26 of article III of the charter of said

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that the placing of poles for the purposes aforesaid is practicable, such poles shall be placed along said alley instead of along the street named in application. Where the poles are set in any alley they shall be located as near the side lines of the alley as practicable, and in such a manner as not to incommode the public or the adjoining proprietors or residents.

§ 609. The poles used as herein provided shall be of sound timber, not less than five inches in diameter, at the upper end, straight, shapely and of uniform size, neatly planed or shaved, and thoroughly painted with two coats of lead and oil paint, of such color as may be directed by the board of public improvements, and be supplied with iron steps, commencing twelve feet from the surface of the ground and reaching to the arms supporting the wires, tubes or cables; said wires, tubes or cables shall be run at a height not less than twenty-five feet above the grade of the street. Whenever the poles are erected on a street they shall be placed, in all cases when practicable, on the outer edge of the sidewalk, just inside the curbstone and on the line dividing the lots one from the other, and in no case be so placed as to obstruct the drainage of the streets, or interfere with or damage in any way the curbstones, trees or other public or private property on the line of the street or alley or public place where such pole shall be erected.

§ 610. Any person or persons, corporation or association having made excavations in the streets, alleys or public places of the city of St. Louis for the purposes aforesaid, shall replace the streets, alleys or public places in such manner and in accordance with such regulations as may from time to time be prescribed by ordinance, or by the board of public improvements, and to the satisfaction of the street commissioners.

§ 611. The right is hereby reserved to the board of public improvements at any time to direct any alterations in the location of said poles, and also in the height at which the wires, tubes or cables shall run; but before any alteration is made, at least five days' notice in writing shall be given to the person or persons, or the president or the officer in charge of the company affected by the proposed alteration, and reasonable opportunity shall be afforded the representative of such company, or any citizen interested, to be heard in regard thereto. But when any such alteration shall be ordered, the said company shall within five days thereafter commence such alterations and complete the same as soon as practical thereafter; and upon failure so to do, it shall be deemed guilty of a misdemeanor, and punished as hereafter provided.

§ 612. No person or persons, corporation or association, shall be entitled to any of the privileges conferred by this article, except upon the following conditions: That said person or persons, corporation or association, before

city, as by respondent alleged, or under any other provision of the charter of said city.

"Relator further shows to the court that by reason of the exemption contained as aforesaid in section 8 of said act of March 2, 1857, relator's charter as granted in and by said act of 1857 and as subsequently amended by the act of March 26, 1868, hereinbefore mentioned, was and is a contract by the State of Missouri with relator, which was not nor is subject to alteration, suspension or repeal by the State of Missouri

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availing himself or itself of any of the rights or privileges granted by this article shall file with the city register his or its acceptance of all the terms of this article, and agree therein that he or it will file with the comptroller of the city, on the first days of January and July of each year, a statement of his or its gross receipts from his or its business arising from supplying electricity for light or power for the six months next preceding such statement, which shall be sworn to by such person or persons, or the president or secretary of such corporation or association; and further agree that he or it will, at the time of filing said statement with the comptroller, pay into the city treasury two and one half per cent on the amount of such gross receipts up to the year eighteen hundred ninety, and five per cent on the amount of gross receipts thereafter. And said person or persons, or corporation or association, shall, at the time of filing said acceptance, also file with the city register his or its penal bond in the sum of twenty thousand dollars with two or more good and sufficient securities, to be approved by the mayor and council, conditioned that he or it will comply with all the conditions of this article, or any ordinance which may be hereafter passed, regulating the placing of wires, tubes or cables in the streets and alleys for the purposes named therein; that he or it will comply with all the regulations made by the board of public improvements having reference to the subject embraced in this article or any ordinance herein named; that he or it will make the statements and payments required by the provisions of this section, and will save the city of St. Louis harmless and indemnified from all loss, cost or damage by reason of the exercise of any of the privileges granted by this article or any ordinance which may be hereafter passed relating to the subject-matter of this article.

§ 613. Any person or persons, corporation or association which, or any president, manager, superintendent or officer in charge of any corporation or association who shall violate or fail to comply with any of the provisions of this article, shall be deemed guilty of a misdemeanor, and upon conviction thereof, be fined not less than fifty dollars, nor more than five hundred dollars.

§ 614. The city reserves the right to alter, amend or repeal this article at any time.

or by any municipality thereof; that said city of St. Louis had not nor has lawful power by ordinance or otherwise to impair the obligation of said contract, nor to abridge or interfere with the full exercise by relator of any corporate franchise thereby granted to it; that the enforcement against said relator of said provisions of said ordinances of said city of St. Louis would be a denial to relator of its corporate rights and franchises aforesaid, and would impair the obligation of the said contract of the said State of Missouri contained in relator's charter as amended, and would be in contravention of section 15 of article II of the constitution of Missouri, 1875, forbidding the general assembly to pass any law impairing the obligation of contracts, and also section 10 of article I of the Constitution of the United States, forbidding any State to pass any such law, each of which constitutional provisions is hereby referred to and relied on by relator for the protection of its corporate rights and franchises aforesaid in this behalf.

"Relator further shows to the court that the only condition annexed by its charter, as amended, to the exercise by relator of its right to establish and lay down in said city all pipes, fixtures or other thing properly required in order to carry on relator's said lighting business, is that the same shall be done with as much dispatch and as little inconvenience to the public as possible, and avers not only that in making its arrangements and preparations to lay its wires under ground along and under the streets of said city as in its petition in this behalf alleged, and in applying to respondent as street commissioner of said city for a permit to make the necessary excavation therefor, relator has fulfilled every condition to which it was or is lawfully subject in that behalf, but also that respondent in refusing to relator such permit did not allege as a ground for such refusal, nor did in fact refuse such permit for the reason that by laying its wires under ground in the manner by it proposed relator would cause any inconvenience to the public, but expressly and unconditionally refused to permit relator to make any excavation in any street of said city.

"Relator shows to the court that, as against this relator, the said ordinances and provisions above mentioned are not valid, legal or binding enactments, nor constitute any defence to this proceeding:

"Because, as relator avers, said provisions are not, so far as relator's rights are concerned, lawful or reasonable regulations of the use of the streets of said city, but were intended to and do prohibit relator from exercising its said charter rights and powers except upon compliance by relator with conditions which the city of St. Louis has not, nor has the municipal assembly thereof, any lawful right or power to impose on relator in that behalf, including as one of said conditions that relator shall first be duly authorized thereto by the municipal assembly, thereby impairing the obligation of the contract contained in relator's charter as amended.

"Because the enforcement against relator by said city or any officer thereof of the conditions prescribed by said ordinances would not be a lawful or reasonable exercise of the power of said city under its charter to regulate the use of its streets or of the police power of said city, but is an attempt by said city under control of its charter powers to compel relator to enter into the obligations and to pay to said city, from time to time, the tax of five per cent upon the gross annual receipts from relator's business prescribed by section 590, article II, chapter 15, of the Revised Ordinance 1887, reënacted as section 612, article II, chapter 15, of the Revised Ordinance 1892, above mentioned; forasmuch as it is provided by said section 590, article II, chapter 15, of the Revised Ordinance 1887, reënacted as section 612, article II, chapter 15, of the Revised Ordinance 1892, that no person or persons, corporation or association, shall be entitled to any of the privileges conferred by said article II, chapter 15, except upon fulfilling the several conditions in said section 612 prescribed, as hereinbefore set forth.

"Because among the conditions prescribed by said section 590, reënacted as section 612, relator would be compelled, before availing itself of any of the rights or privileges mentioned in said article II, chapter 15, Revised Ordinance 1887,

reënacted as article II, chapter 15, Revised Ordinance 1892, to file with the city register its penal bond in the sum of twenty thousand dollars, conditioned that relator will comply with all the conditions of said article II, or with any ordinance which might thereafter be passed, and will comply with all regulations which may be made by the board of public improvements having reference to the subject-matter embraced in said article II or any ordinance therein named; all which requirements and conditions are a denial of relator's rights under its charter and impair the obligation of the contract contained therein as aforesaid.

"Because said article II, chapter 15, Revised Ordinance 1887, reënacted as article II, chapter 15, Revised Ordinance 1892, purports to authorize the board of public improvements of said city, in granting a permit for the use or occupation of the streets, alleys and public places of said city for the purposes therein mentioned, to prescribe such restrictions, regulations and qualifications as said board may think fit in respect of the use of said streets, alleys and public places, and requires every person or corporation obtaining such permit, as a condition of availing itself of the privileges mentioned in said article II, to agree to comply with all such regulations made by said board, whereas the power to regulate the use of the streets of said city, granted — clause 2, section 26, of article III, of its charter — is granted only to the mayor and assembly of said city, to be exercised by ordinance not inconsistent with the constitution or any law of this State or with said charter, and does not authorize the said mayor and municipal assembly or either of them, by ordinance, or otherwise, to delegate to the board of public improvements of said city the power to make regulations for the use of said streets. Wherefore, relator says, that said requirements and said condition are unlawful and void.

"And relator says that the several conditions and requirements prescribed in said article II, chapter 15, Revised Ordinance 1887, as amended and reënacted in article II, chapter 15, Revised Ordinance 1892, are not independent of each other, but are so framed as to subject relator, its officers and

agents, to the penalties prescribed in section 591 of Revised Ordinance 1887, reënacted as section 613 of Revised Ordinance 1892, unless, before placing along, across or under any street of the city of St. Louis, any wires, such as hereinbefore mentioned, it, said relator, shall not only have obtained authority so to do from the municipal assembly of the city of St. Louis, but shall also have filed in the office of the board of public improvements of said city an application therefor, such as prescribed in section 583, Revised Ordinance 1887, reenacted as section 605, Revised Ordinance 1892, and shall have obtained a permit therefor from said board with such restrictions, regulations and qualifications as by it prescribed, and shall also have filed with the city register its acceptance of all the terms of said article II, chapter 15, and shall therein agree as required by section 590, Revised Ordinance 1887, reënacted as section 612, Revised Ordinance 1892, to file with the comptroller of said city sworn semi-annual statements of its gross receipts from its business, and to pay to the city treasurer a tax of five per cent upon the amount of such gross receipts, and shall also have filed with the city register its bond in the sum of twenty thousand dollars, conditioned as prescribed in said section 590, Revised Ordinance 1887, reënacted as section 612, Revised Ordinance 1892; all which requirements and conditions are a denial of relator's rights under its charter and impair the obligation of the contract contained therein as aforesaid."

To this traverse respondent filed a general demurrer, assigning also special grounds.

Subsequently the city of St. Louis was made a party; entered its appearance; and adopted as its own the return of the street commissioner and his demurrer to the traverse.

The demurrer was then sustained by the Supreme Court, "for the reasons given in the opinion heretofore rendered in this cause, to which reference is hereby made as a part of this judgment," and judgment was again entered denying the peremptory writ.

A writ of error from this court was allowed by the Chief Justice of Missouri. The opinion of the state court forms part of the record and is reported in 130 Missouri, 10.

The court in that opinion stated that on the pleadings the following issues of law were fairly framed:

"*First.* Is the act of March 26, 1868, unconstitutional as being in conflict with section 2, article VIII, of the constitution of Missouri of 1865?

"*Second.* Is said act void as being in conflict with section 25 of article IV of said constitution?

"*Third.* Did the charter of relator expire by limitation at the end of thirty years from the date of the act of March 2, 1857?

"*Fourth.* Do the powers granted relator include the right to manufacture, sell or distribute electricity for lighting purposes?

"*Fifth.* Has relator the right, under its charter, to place its wires under ground without the assent of the municipal authorities and without compliance with the requirements of the valid ordinances of the city?"

But the court declined to express an opinion on "any question involving the right of relator to exercise the rights, or enjoy the franchises which appear to have been granted under the acts of the general assembly mentioned in the statement;" or "to inquire whether the right to use electricity for making light was included under the terms 'substance or material' as used in the charter," and confined itself "to the question whether relator has a vested right to place its electric wires under the surface of the streets without the assent of the municipal authorities thereof and without compliance with valid ordinances of the city."

And this question, for reasons given, the Supreme Court determined in the negative, and held that "respondent, under his official duties as street commissioner, properly refused to grant the permit demanded, unless relator first complied with the requirements of the valid ordinances then in force."

Mr. Henry Hitchcock for plaintiff in error.

Mr. W. C. Marshall for defendants in error.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

Mandamus lies to compel a party to do that which it is his duty to do, but can confer no new authority, and the party to be coerced must have the power to perform the act. *Brownsville* v. *Loague*, 129 U. S. 493, 501.

On the facts disclosed by the record, was it the duty of the street commissioner to issue a permit to the company to make excavations on Broadway so that it might place electric wires under the surface of the street?

The Supreme Court of the State held that it was not the duty of the street commissioner to do so. Did that court in so holding give effect to ordinances impairing the obligations of the contract created by the company's charter?

Assuming the charter to be in force, as contended, the company was authorized to light the city, and to lay down pipes for that purpose, "with as much dispatch and as little inconvenience to the public as possible." It originally furnished light by means of gas through underground pipes, and when electricity came into use it furnished electric light through overhead wires. It now sought to put these electric wires under the surface; and it insisted that it had a vested right to do this without being controlled by the municipal authorities.

Subsequently to the passage of the acts of 1857 and 1868, a city charter had been adopted, whereby the State vested the city with the power to regulate the use of the streets, and pass ordinances deemed expedient "in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures."

The board of public improvements of the city of St. Louis, consisting of a president, the street commissioner, the sewer commissioner, the water commissioner, the harbor and wharf commissioner and the park commissioner, has existed for many years under the charter and ordinances of that city. Each of these commissioners is the head of the department indicated by the title of the office, and has special charge thereof, but subject to the general control of the board, and the board is charged with the duty, among other things, of furnishing data and information to the municipal assembly of the city in respect of matters with which it is called upon

to deal; preparing and recommending ordinances for the improvement and lighting of the streets; and establishing regulations for excavations and the laying of gas pipes in the streets, etc., etc., chap. 33, Rev. Ord. 1892, p. 976; chap. 32, Rev. Ord. 1887, p. 893; chap. 32, Rev. Ord. 1881, p. 716.

The street commissioner had primary jurisdiction over streets and highways, and § 568, Article I of chap. 15 of the Revised Ordinance of 1887, which article treated of excavations in streets and public places, for various purposes, provided that "No person shall make or cause to be made any excavation on any public street, highway or alley, without written permission of the street commissioner so to do, except public work done under the authority of the water or sewer commissioner, who at the time of ordering any such excavating shall notify the street commissioner of the same."

By §§ 581, 582, 583, *et seq.*, Article II of the same chapter, wires, tubes or cables carrying electricity for the production of light or power were to be placed above or below the surface of the ground of streets, alleys or public places, and secured in such manner as prescribed by the board of public improvements, and that board, on the filing of an application stating the streets, alleys and public places desired to be occupied and the manner in which the wires, tubes or cables were to be secured, were authorized to grant a permit for such occupancy, with such restrictions, regulations and qualifications as the board might designate, etc., etc. These were sections of Ordinance No. 12,723. (See Revised Ordinance 1887, p. 652.)

Section 590, Article I, chap. 15 of the Revised Ordinance of 1892, was the same as § 568 of Revised Ordinance of 1887, and §§ 603, 604, *et seq.*, of Art. II of that chapter, quoted *ante*, corresponded substantially with sections 581, etc., of the Ordinance of 1887. (Revised Ordinance 1892, p. 660.)

Section 2721, chap. 42 of the Revised Statutes of Missouri of 1889, (vol. 1, p. 693,) provided: "Companies organized under the provisions of this article, for the purpose of constructing and maintaining telephone or magnetic telegraph lines, are authorized to set their poles, piers, abutments, wires and other fixtures along, across or under any of the public

roads, streets and waters of this State, in such manner as not to incommode the public in the use of such roads, streets and waters; *Provided*, Any telegraph or telephone company desiring to place their wires and other fixtures under ground, in any city, shall first obtain consent from said city through the municipal authorities thereof."

The company asserted by its pleadings that it had never accepted the provisions of Ordinance 12,723, and the subsequent ordinances, and had never obtained the consent of the municipal assembly to occupy the streets with electric wires laid under their surface.

Nor had the company ever applied to the board of public improvements for a permit to occupy Broadway with electric wires laid under the surface of that street.

But the company asserted that the only limitation on its power to so occupy the streets was that the work should be done "with as much dispatch and as little inconvenience to the public as possible."

And, admitting that it sought to excavate with the view to occupy the street with electric wires laid under the surface, the company demanded the writ of mandamus to compel the street commissioner to issue a permit allowing it to excavate for that purpose.

The Supreme Court held that the grant of the State to the company, "though construed to include the right to use electricity for illuminating purposes in respect to such right was taken subject to reasonable regulations as to its use, and the power to regulate has been delegated to the city of St. Louis. Under its general public power the city has the right to require compliance with reasonable regulations as a condition to using its streets by electric wires."

In view of the want of knowledge of the art of producing light by electricity when the franchise was granted, the court thought that "it would be most unwarrantable to imply, not only that relator had the right under the general words used in the act of incorporation to use electricity for lighting purposes, but that it also had the right to adopt its own methods for exercising that power, regardless of the paramount rights

of the public to the use of the streets. The power delegated to the city to regulate the use of its streets existed before the art of lighting by electricity was known, or at least before relator adopted it, and the art should be exercised, if at all, under the powers thus in force when it was brought into use."

Considering the danger to life and property from electric wires when charged, it seemed to the court too plain for argument that the city should have the right to direct the manner in which their use should be exercised, and especially when more than one method was open, and the rights and safety of the public were more or less affected by either.

Again, many companies used electric wires for various purposes, and to accommodate them all and prevent monopolies in the use of the streets it appeared absolutely necessary that the municipal authorities should have the right to direct the manner in which wires should be placed under ground.

The court was of opinion that it would be time enough for the company to complain when its rights were distinctly infringed, and held that the street commissioner "properly refused to grant the permit demanded unless relator first complied with the requirements of the valid ordinances then in force."

Obviously the Supreme Court declined to enter on a discussion as to what were and what were not valid ordinances, as respected the company, because the record showed that the company denied that it was subject to any control by the municipal authorities, and claimed that all that was required of it by its charter was to do the work with as much dispatch and as little inconvenience as possible.

It had made no application to the municipal assembly, directly or through the board of public improvements, for authority to proceed.

It had not filed any application with the board of public improvements giving details of the streets it wished to occupy, and the manner in which the wires, etc., were to be secured, supported and insulated, and a plat of the route; nor asked that board for a permit for the occupancy it desired.

Whatever objections the company may have been entitled

to raise to particular provisions of the ordinances, in denial of their applicability or validity, it took no action whatever, so far as this record shows, calculated to bring such matters to a distinct issue.

The street commissioner had no power under the charter and ordinances to issue the permit requested in the absence of the assent of the board of public improvements, which had general control; and the court could not command him to do that which it was not his official duty to perform.

Judgment to that effect in itself involved no Federal question, for confessedly there was no contract right that leave to excavate should be given by a particular officer; but we concur with the conclusion of the Supreme Court that the company was subject to reasonable regulations in the exercise of the police powers of the city, and so far as that involved any Federal question, such question was correctly decided. *New York* v. *Squire*, 145 U. S. 175; *St. Louis* v. *Western Union Telegraph Company*, 148 U. S. 92; 149 U. S. 465.

We are unable to accede to the contention that the company was entitled by contract with the State to lay electric wires under ground without reference to the directions or regulations of the city on that subject; or that the street commissioner was obliged to permit it to excavate the streets for that purpose without the assent of the board of public improvements or of the municipal assembly, or effort to obtain either, on the mere averment of the company that it fears it might thereby subject itself to requirements from which it insists it was exempted by the terms of its charter.

If the company, as it asserted, possessed the right to place electric wires beneath the surface of the streets, that right was subject to such reasonable regulations as the city deemed best to make for the public safety and convenience, and the duty rested on the company to comply with them.

If requirements were exacted or duties imposed by the ordinances, which, if enforced, would have impaired the obligations of the company's contract, this did not relieve the company from offering to do those things which it was lawfully bound to do.

Statement of the Case.

The exemption of the company from requirements inconsistent with its charter could not operate to relieve it from submitting itself to such police regulations as the city might lawfully impose. And until it had complied, or offered to comply, with regulations to which it was bound to conform, it was not in a position to assert that its charter rights were invaded because of other regulations, which, though applicable to other companies, it contended would be invalid if applied to it.

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The Supreme Court of Missouri did not feel called on to define in advance what might, or might not, be lawful requirements; and there is certainly nothing in this record compelling us to do so.

It must be remembered that the case does not come before us from the Circuit Court. This is a writ of error to revise the judgment of the highest tribunal of a State, and this we cannot do unless Federal questions have been erroneously disposed of.

Judgment affirmed.